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A
T R E A T I S E
ON THE
P L E A D I N G S
IN
S U I T S
IN THE
C O U R T O F C H A N C E R Y
BY ENGLISH BILL.
Mitford
IN TWO BOOKS.

L O N D O N,
Printed for W. OWEN, between the Temple-Gates,
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1780

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TO
THE RIGHT HONOURABLE
EDWARD LORD THURLOW,
BARON THURLOW OF ASHFIELD
IN THE COUNTY OF SUFFOLK,
LORD HIGH CHANCELLOR
OF
GREAT BRITAIN,
THE FOLLOWING TREATISE,
ON THE PLEADINGS
IN THE COURT OF EQUITY
IN WHICH HIS LORDSHIP PRESIDES,
IS RESPECTFULLY INSCRIBED.

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P R E F A C E.

AN attempt to methodize the subject of the following pages has not, it is apprehended, yet appeared in print. The materials for a work of this nature, which are open to the public, are not very ample, or satisfactory. They consist, principally, either of mere

P R E F A C E.

books of practice, or of reports of adjudged cases, generally short, and sometimes incorrect. The experience of the author of the following pages has not enabled him to go much beyond those materials, and he is conscious that the work is therefore very imperfect. An unwillingness to rest his assertions on his own authority merely has induced him frequently to refer to books of no esteem; and, perhaps, the number of references is too great, unless the work is considered as an index to what may be found on the subject in other books. There
are

P R E F A C E,

are, indeed, in private hands, notes of determinations, of which no reports have been yet published, and also notes of published cases more accurate than the printed reports. A communication, through the bookseller, of any such notes, of any information which experience may be able to furnish, of any hints for the better arrangement of the work, or of any censure of its inaccuracies, will be esteemed a favor. If what is now offered to the public shall be so far approved, as to encourage an attempt to render it more worthy of notice, the advantages

P R E F A C E.

which may be derived from any such communication will be made use of for that purpose.

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INTRO.

INTRODUCTION.

Of the manner in which suits are instituted and defended.

A SUIT, seeking relief or assistance from the extraordinary jurisdiction of the court of chancery as a court of equity, is commenced by preferring a bill, in the nature of a petition ^a, to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal, or to the king himself in his court of chancery, in case the person holding the seals is a party ^b, or the seals are in the king's hands ^c. The bill so preferred may either

^a Prac. Reg. 24. This authority, yet *better collected than most of the kind.*

book, and other books of practice, are only cited where no other authority occurred, or where they might lead the reader to farther information on the subject. The Practical Register is mentioned by Lord Hardwicke, 2 Atk. 22.

^b 4 Vin. Ab. 385. L. Leg. Jud. in Ch. 44. 255. 258. Jud. Auth. M. R. 182. 1 Prac. Alm. Cur. Canc. 463. Ld. Chan. Jefferies against Witherley.

^c 2 West. Symb. Chancery, 194. b.

B

complain

complain of some injury, which the person exhibiting the bill suffers from some other person, and from which it is the peculiar office of a court of equity to relieve the sufferer, and pray relief according to the injury; or, without praying relief against an injury suffered, it may seek a discovery of matter necessary to support, or defend, an action at the common law; or, although no actual injury is suffered, it may complain of a threatened wrong, and, stating a probable ground of possible injury, may pray the assistance of the court, to enable the person complaining, to defend himself against the injury, whenever it should be attempted to be committed^d. If a suit is instituted on behalf of the crown, or of those who partake of its prerogative, or for whom it is a trustee, the proceeding is rather varied in style; the matter of complaint being offered to the court by way of information, given by the proper officer, and not by way of petition.

The bill generally requires the answer of the party complained of upon oath. It was always, therefore, necessary that it should be in the English language; and a suit preferred in this manner in the court of chancery was termed a suit *by English bill*, by way of distinction from the proceedings in suits within the ordinary jurisdiction of the court, which, till the 4 Geo. II. c. 26. were entered, and enrolled, more anciently in the French or Norman

^d Prec. in Ch. 531. 1 Atkyns, 284.

tongue, and afterwards in the Latin, in the same manner as the pleadings in the other courts of common law.

To the complaint thus made, it is necessary for the person complained of either to make defence, which may be done, 1. by demurrer; 2. by plea; 3. by answer; or to disclaim all right to the matters in question by the bill. A demurrer admits the truth of the facts contained in the bill, or in the part of the bill to which it extends; but insists, that from some matter of law, or some matter apparent on the face of the bill, the plaintiff, or person exhibiting the bill, is not intitled to the relief, or to the whole of the relief, he seeks by it. Therefore a demurrer, if allowed, prevents any farther proceedings upon the bill, or upon so much thereof as the demurrer extends to. But a plea, or answer, controverts the facts in the bill; and generally states other facts, to shew the rights of the defendant, or person against whom the bill is exhibited. The plaintiff, therefore, may deny the truth of a plea, or answer, and assert the sufficiency of the bill, by a replication; and thereupon proceed to examine witnesses to support the case made by the bill, and to invalidate the plea, or answer. The replication concludes the pleadings, according to the present ^e practice of the court. A disclaimer, neither asserting any fact, nor denying any right sought by the bill, admits no farther pleading.

^e See book ii. chap. 6.

In an enquiry into the nature of the several pleadings, it seems most convenient to consider them in the order in which they have their effect, and consequently to treat, 1. of bills; 2. of the defence to bills, and therein of demurrers, pleas, answers, and disclaimers; and 3. of replications.

BOOK THE FIRST.

OF BILLS.

CHAPTER I.

Of the persons capable and incapable, by themselves, of exhibiting a bill.

IN treating of bills, it will be proper to consider, 1. the several persons who are capable of exhibiting a bill, by themselves, or under the protection, or in the name, of others: 2. the several kinds, and distinctions, of bills: and 3. the frame, and end, of the several kinds of bills.

All bodies politic and corporate, and all persons of full age, not being *femes-covert* ^a idiots or lunatics ^b, may *by themselves* exhibit a bill of complaint

^a The queen consort may sue alone. Co. Litt. 133. So may a queen dowager, though married. 2 Inst. 50.

^b It may seem, that the disabilities arising from outlawry, excommunication, conviction of Popish recusancy,

attainder, and alienage, and those which formerly arose from villenage and profession, ought to be here noticed. Such of them as subsist do not, and the others did not, absolutely disable the person suffering under them

plaint in the court of chancery, excepting only the king and queen. Suits in respect to rights of the crown^c, or of those for whom it is a trustee, are carried on in the name of the king's attorney or solicitor-general^d. As these officers of the crown are supposed to act in this instance merely officially, the bill they exhibit is by way, not of complaint, but of information to the court of the rights which the crown claims on behalf of itself or others, and of the invasion or detention of those rights, for which the suit is instituted. If the suit does not immediately concern the rights of the crown, its officers are not supposed to have any personal knowledge of the matter, but to depend on the relation of some

from exhibiting a bill. Outlawry, excommunication, and conviction of Popish recusancy, are not in some cases any disability; and where they are a disability, if it is removed by reversal of the outlawry, by purchase of letters of absolution in the case of excommunication, or by conformity in the case of a Popish recusant, a bill exhibited under the disability may be proceeded upon. Attainder and alienage no otherwise disable a person to sue, than as they deprive him of the property which may be the object of the suit. Villenage and profession were in the same predicament.

^c 1 Vern. 277. 370. Att. Gen. v. Vernon.

^d See, as to the solicitor general, Wilkes's Case, 4 Burr. 2527; and, Sol. Gen. v. Warden and Fellowship of Sutton Coldfield, Mich. 1763, in chancery. This subject is particularly considered in part iii. sec. 3. of a treatise on the Star-chamber, in the British Museum, Harl. MSS. vol. i. no. 1226, mentioned in 4 Bl. Com. 267. As the mode of proceeding in the court of star-chamber resembled that in courts of equity, the above-mentioned manuscript will, in subsequent parts of this work, be referred to as an authority.

person,

person, whose name is inserted in the information; and who is termed the relator. It sometimes happens, that this person has an interest in the matter in dispute, of the injury to which interest he has a right to complain. In this case his personal complaint being joined to, and incorporated with, the information given to the court by the officer of the crown, they form together an information and bill, and are so termed. But if the suit *immediately* concerns the rights of the crown, the information is generally exhibited without a relator ^e. Where a relator in such a case has been named, it has been done through the tenderneſs of the officers of the crown towards the defendant, that the court might award coſts againſt the relator, if the ſuit ſhould appear to have been improperly inſtituted, or in any ſtage of it improperly conducted ^f. The queen-conſort, partaking of the prerogative of the crown, may alſo inform by her attorney ^g. An information differing from a bill in little more than in name and in form, its nature will be principally conſidered under the general head of bills, and its peculiarities will be taken notice of at the concluſion of the book.

^e Att. Gen. v. Vernon. 1. Vern. 277. 370. Att. Gen. v. Crofts. 1. Brown. Parl. Ca. 222.

^f The propriety of naming a relator for this purpoſe, and the oppreſſion ariſing from a contrary practice, were particularly noticed by

baron Perrot, in a cauſe in the exchequer, Att. Gen. v. Fox. In that cauſe no relator was named; and though the defendants finally prevailed, they were put to an expence almoſt equal to the value of the property in diſpute.

^g 2 Roll. Ab. 213.

The persons, who are incapable *by themselves* of instituting a suit, are, 1. infants; 2. married women; 3. idiots, and lunatics.

1. An infant is incapable by himself of exhibiting a bill, as well on account of his supposed want of discretion, as his inability to bind himself, and to make himself liable to the costs of the suit. When therefore an infant claims a right, or suffers an injury, on account of which it is necessary to resort to the extraordinary jurisdiction of the court of chancery, his nearest relation is supposed to be the person who will take him under his protection, and institute a suit to assert his rights, or to vindicate his wrongs. The person, who institutes a suit on behalf of an infant, is therefore termed his *next friend*. But as it frequently happens, that the nearest relation of the infant himself with-holds the right, or does the injury, or at least neglects to give that protection to the infant which his consanguinity or affinity calls upon him to give, the court, in favour of infants, will permit any person to institute suits on their behalf ^h. Such person, being supposed to act the part which the nearest relation ought to take, is also styled the next friend of the infant, and as such is named in the bill. The next friend is liable to the costs of the suit ^l; and to the censure of the

^h Prec. in Ch. 376. 1 Atkyns, 570. ⁱ Mosely, 47. 86.

court, if the suit is wantonly or improperly instituted.

2. A married woman being under the protection of her husband, a suit respecting her rights is usually instituted by them jointly. But it sometimes happens, that a married woman claims some right in opposition to rights claimed by her husband; and then the husband being the person, or one of the persons, to be complained of, the complaint cannot be made by him. In such case, therefore, as the wife, being under the disability of coverture, cannot sue alone, and yet cannot sue under the protection of her husband, she must seek some other protection, and the bill must be exhibited in her name by her next friend ^k, who is also named in the bill in the same manner as in the case of an infant. But a bill cannot in the case of a feme-covert be filed without her consent ^l, as may be done in the case of an infant.

3. The care and commitment of the custody of the persons and estates of idiots and lunatics are the prerogative of the crown, and are always granted to the person holding the great seal, by the royal sign manual. By virtue of this authority, upon an inquisition finding any person an idiot, or a lunatic, grants of the custody of the person and estate of the idiot, or lunatic, are made to such persons as the lord chancellor, or lord keeper, or lords com-

^k 2 Vesey, 452.

^l Prec. in Ch. 376.

missioners

missioners for the custody of the great seal for the time being, shall think proper ^m. Idiots and lunatics, therefore, sue by the committees of their estates ⁿ. Sometimes, indeed, informations have been exhibited by the attorney-general, on behalf both of idiots and lunatics, considering them as under the peculiar protection of the crown ^o.

^m 3 P. Williams, 106, 107.

Reg. 232.

ⁿ Eq. Ca. Ab. 279. Prac.

^o 1 Chan. Ca. 112. 153.

C H A P. II.

Of the several kinds and distinctions of bills.

BILLS, with respect to their several kinds and distinctions, may be considered under three general heads. I. Original bills, which relate to some matter not before litigated in the court by the same persons standing in the same interests. II. Bills not original, which are either an addition to, or a continuance of, an original bill, or both. III. Bills, which, though occasioned by, or seeking the benefit of, a former bill, are not a continuance thereof, and are therefore in the nature of original bills.

I. Original bills may be again divided into bills praying relief, and bills not praying relief.—An original bill praying relief may be, 1. A bill praying the decree of the court touching some right claimed by the person exhibiting the bill, in opposition to some right claimed by the person against whom the bill is exhibited. 2. A bill of interpleader, where the person exhibiting the bill claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons, for the safety of the person exhibiting the bill. 3. A bill praying the writ of certiorari to remove a cause from an inferior court of equity.—

An

An original bill not praying relief may be, 1. A bill to perpetuate the testimony of witnesses. 2. A bill for discovery of facts resting within the knowledge of the person against whom the bill is exhibited, or of deeds, writings, or other things, in his custody or power.

II. A bill not original, but an addition to, or a continuance of, an original bill, or both, may be, 1. A supplemental bill, which is merely an addition to the original bill. 2. A bill of revivor, which is a continuance of the original bill, when by death some party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has by marriage incapacitated herself from suing alone. 3. A bill both of revivor and supplement, which both continues a suit upon an abatement, and supplies defects arisen from some event subsequent to the institution of the suit.

III. A bill in the nature of an original bill, though occasioned by, or seeking the benefit of, a former bill, may be, 1. A cross bill, exhibited by the defendant in a former bill, against the plaintiff in the same bill, touching some matter in litigation in the first bill. 2. A bill of review, to examine and reverse a decree, made upon a former bill, and signed by the person holding the seals, and inrolled, whereby it has become a record of the court. 3. A bill in the nature of a bill of review, brought by a person not bound by the former decree. 4. A bill to impeach a decree upon the ground of fraud. 5. A bill

to carry a decree made in a former suit into execution. 6. A bill in the nature of a bill of revivor, to obtain the benefit of a suit after abatement, in certain cases which do not admit of a continuance of the original bill. 7. A bill in the nature of a supplemental bill, to obtain the benefit of a suit, either after abatement in other cases which do not admit of a continuance of the original bill; or after the suit is become defective, without abatement, in cases which do not admit of a supplemental bill to supply that defect. 8. A bill filed by the direction of the court, for the purpose of obtaining its decree touching some matter not put in issue by a former bill, or not in issue between the proper parties, but which must necessarily be determined, to enable the court to make a complete decree touching the matters in litigation upon the first bill.

C H A P. III.

Of the frame and end of the several kinds of bills.

THE several kinds of bills have been already considered as divided into three classes. In the first class have been ranked original bills; in the second, bills not original; in the third, bills in the nature of original bills, though occasioned by former bills. Informations may be considered under a fourth head.

I. Original bills have been mentioned as again divisible into bills praying relief, and bills not praying relief.

Original bills praying relief have been ranked under three heads.—1. Original bills praying the decree of the court touching some right claimed by the person exhibiting the bill, in opposition to rights claimed by the person against whom the bill is exhibited. 2. Bills of interpleader. And 3. Certiorari bills.—Bills of the first kind are the bills most usually exhibited in the court; and as the several other kinds of bills are either consequences of this, or very similar to it in many respects, the consideration of bills of this kind will in a great measure involve the consideration of bills in general.

I. An original bill praying the decree of the court touching rights claimed by the person exhibiting the bill, in opposition to rights claimed by the

the

the person against whom the bill is exhibited, must shew the rights of the plaintiff, or person exhibiting the bill; by whom, and in what manner, he is injured; or in what he wants the assistance of the court; that he is without remedy, except in a court of equity; or at least is properly relievable, or can be most effectually relieved there. Having thus shewn the plaintiff's title to the assistance of the court, the bill may pray, that the defendant, or person against whom the bill is exhibited, may answer upon oath the matters charged against him. It may also pray the relief or assistance of the court, which the plaintiff's case intitles him to. For these purposes the bill must pray, that a writ, called a writ of subpœna, may issue under the great seal, which is the seal of the court, to require the defendant's appearance, and answer to the bill. It is usual to add to the prayer of the bill, a general prayer of that relief, which the circumstances of the case may require; that if the plaintiff mistakes the relief to which he is intitled, the court may yet afford him that relief to which he has a right ^p. Indeed, a prayer of general relief, without a special prayer of the particular relief to which the plaintiff thinks himself intitled, is sufficient ^q; and the particular relief the case requires may, at the hearing, be prayed at the bar. But this relief must be agreeable to the case made by the bill, and not different from it ^r.

^p 2 Mod. 91, 92.

^q 2 Atkyns, 3.

^r 2 Atkyns, 141. 3 Atk.
132.

All persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties, if within the jurisdiction of the court^a. But if any necessary parties are omitted, or unnecessary parties are inserted, the court, upon application, will permit the proper alterations to be made. If, however, a person has been made a plaintiff who is an unnecessary party, or ought to have been a defendant, the court will not permit his name to be struck out as a plaintiff, especially after answer, unless upon a special application; and then, if the defendants require it, not without security for their costs.

It is the practice to insert in a bill a general charge, that the parties named in it combine together, and with several other persons, unknown to the plaintiff, whose names, when discovered, the plaintiff prays he may be at liberty to insert in the bill. This practice is said to have arisen from an idea, that without such a charge parties could not be added to the bill by amendment. From whatever cause it has arisen it is still adhered to, except in the case of a peer, who was never charged with combining with others to deprive a plaintiff of his right, either out of respect to the peerage, or perhaps apprehension that such a charge might be construed a breach of privilege.

The rights of the several parties, the injury complained of, and every other necessary circumstance,

^a Prec. in Ch. 83. 2 Atkyns, 510.

as time, place, manner, or other incidents, ought to be plainly, yet succinctly, alledged. And as the bill must be sufficient in substance, so it must have convenient form^t.

Every bill must be signed by counsel; and if it contains matter criminal, impertinent, or scandalous, such matter shall be expunged, and the counsel shall pay costs to the party aggrieved^u. But nothing relevant is to be considered as scandalous^x.

Two several bills cannot be filed against the same defendants for the same matters, nor one bill for separate and distinct matters; nor will the court permit a plaintiff to file several bills against several defendants, where their interests are all the same, and can properly be determined upon one bill.

2. Where two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them^y. In this bill he must state his own rights, and their several claims, and pray that they may interplead, so that the court may adjudge to whom the thing belongs, and he may be indemnified^z. If any suits at law are brought against him, he may also pray, that the

^t Prac. Reg. 24, 25.

^u Rules and Orders of Cha. Ab. 80.

93. 1 Ch. Rep. 194.

^x 2 Vesey, 24.

^y Bunbury, 303. 1 Equ. Ca.

Ab. 80.

^z 2 Eq. Ca. Ab. 173. 1

Burr. 37. Prac. Reg. 38.

claimants may be restrained from proceeding till the right is determined ^a. The plaintiff, in a bill of interpleader, must annex to it an affidavit, that there is no collusion between him and any of the parties; and if any money is due from him, he ought to bring it into court, or offer so to do by his bill ^b.

3. When an equitable right is sued for in an inferior court of equity, and, by means of the limited jurisdiction of the court, the defendant cannot have complete justice, or the cause is without the jurisdiction of the inferior court, the defendant may file a bill in chancery, praying a special writ, called a writ of certiorari, to remove the cause into the court of chancery ^d. This species of bill, having no other object than to remove a cause from an inferior court of equity, merely states the proceedings in the inferior court, shews the incompetency of that court, and prays the writ of certiorari. It does not pray, that the defendant may answer, or even appear, to the bill, and consequently it prays no writ of subpœna. The proceedings upon the bill are peculiar, and are particularly mentioned in the books which treat of the practice of the court ^e. It may seem improper to consider certiorari bills

^a Prac. Reg. 39.

Lond. 291. Car. Rep. 48.

^b Prac. Reg. 39. Bunbury, 1 Vern. 178.

303.

^c Prac. Reg. 41. Sol. Prac.

^d 2 Chan. Rep. 109, 110.

in Chan. epit. 4.

^e Prac. Reg. 41. Boh. Priv.

under the head of bills praying relief. But as they always alledge some incompetency of the inferior court, or injustice in its proceedings^f, and seek relief against that incompetency, or injustice, they seem more properly to come into consideration under this head, than under any other; especially as in case the court of chancery removes the cause from the inferior court, the bill exhibited in that court is considered as an original bill in the court of chancery, and is proceeded upon as such.

Original bills not praying relief have been already mentioned to be of two kinds, 1. bills to perpetuate the testimony of witnesses; and 2. bills of discovery.

1. A bill to perpetuate the testimony of witnesses must shew a title in the plaintiff^g to the thing where-to the testimony relates, and pray leave to examine witnesses thereto, to the end their testimony may be preserved and perpetuated.

2. Every bill is in reality a bill of discovery; but the species of bill usually distinguished by that title, is a bill for discovery of facts resting in the knowledge of the defendant, or of deeds or writings in his custody or power, and seeking no relief in consequence of the discovery. A bill of this nature must shew a right to the discovery prayed. To a bill seeking a discovery of deeds or writings, a prayer that they may be delivered up is sometimes

^f 1 Vern. 442.

Smith v. Att. Gen. Mich.

^g Rep. Temp. Finch. 391. 1777.

added. But if any relief beyond the mere delivery of the deeds or writings is prayed, the plaintiff must annex to his bill an affidavit, that the deeds, of which he seeks a discovery, are not in his custody or power, and that he knows not where they are, unless they are in the hands of the defendant. A bill for a discovery merely, or which only prays the delivery of deeds or writings, requires no such annexed affidavit ^b.

II. Bills not original are either an addition to, or a continuance of, an original bill, or both. A suit, perfect in its institution, may by some subsequent event become defective, so that no proceeding can be had, either as to the whole, or as to some part, with effect. Or it may become abated, so that there can be no proceeding at all, either as to the whole, or as to part of the bill. The first is the case, where, although the parties to the suit remain before the court, some subsequent event has either made such a change in their interests, or given to some other person such an interest in the matters in litigation, that the proceedings, as they stand, cannot have their full effect. The other is the case where, by some subsequent event, there is no person before the court, by whom, or against whom, the suit, in the whole, or in part, can be prosecuted. It is not very accurately ascertained in the books of practice, or in the reports, in what cases

^b 2 P. Wms 541. 3 Atkyns, 132.

a suit becomes defective, without being absolutely abated; and in what cases it abates, as well as becomes defective. But upon the whole it may be collectedⁱ, that if by any means the interest of a party in any matter in litigation becomes vested in another, the proceedings are rendered defective, in proportion as that interest affects the suit; so that although the parties to the suit remain as before, yet the end of the suit cannot be obtained. And if such a change of interest is occasioned by, or is the consequence of, the death of a party whose interest is not determined by his death, or the marriage of a female plaintiff, the proceedings become likewise abated, or discontinued, either in part or in the whole. For as far as the interest of a party dying extends, there is no longer any person before the court by whom, or against whom, the suit can be prosecuted; and a married woman is incapable by herself of prosecuting a suit. As the interest of a plaintiff generally extends to the whole suit, therefore, in general, upon the death of a plaintiff, or marriage of a female plaintiff, all proceedings become abated^k. Upon the death of a defendant,

ⁱ It is impossible to give authorities for every thing asserted upon this head. The books, in words, almost as frequently contradict as support these assertions. But it is conceived, that from an attentive perusal of the cases it will be found, that, in general, the grounds of the decisions warrant the conclusions here drawn.

^k 1 Eq. Ca. Ab. 1. margin.

likewise, all proceedings abate as to that defendant. But upon the marriage of a female defendant the proceedings do not abate ^l, though her husband ought to be named in the subsequent proceedings ^m. If the interest of a party dying so determines that it can no longer affect the suit, and no person becomes intitled thereupon to the same interest, as frequently happens in the case of a tenant for life, the suit does not abate. If the interest of a party dying survives to another party; as if a bill is filed by, or against, trustees or executors, and one dies; or by or against husband and wife, in right of the wife, and the husband dies ⁿ; the proceedings do not abate. So if a surviving party can sustain the suit, as in the case of several creditors plaintiffs on behalf of themselves and other creditors; for the persons remaining before the court, in all these cases, have in them the whole interest in the matter in litigation, or at least are competent to call

^l 4 Vin. Ab. 147. Pl. 20.
¹ Vern. 318.

^m The reason of the difference between the cases of a female plaintiff and defendant seems to be, that a plaintiff seeking to obtain a right, the defendant may be injured by answering to one who is not intitled to sue for it; but a defendant merely justifying a possession, the plaintiff cannot be injured by a decree against the person holding

that possession. And it has been determined, that where a female plaintiff has married, and has, notwithstanding, proceeded in a suit as a feme sole, the mere want of a bill of revivor is not error for which a decree can be reversed, upon a bill of review brought by the defendant. 1 Chan. Rep. 231. Nelf. Rep. 86.

ⁿ 3 Chan. Rep. 40. 2 Vern. 249. 3 Atkyns, 726.

upon

upon the court for its decree. If, indeed, upon the death of the husband of a female plaintiff, suing in her right, the widow does not proceed in the cause, the bill is considered as abated, and she is not liable to the costs ^a. But if she does take any step in the cause, the suit may proceed without a bill of revivor; for she alone has the whole interest, and the husband was a party in her right. The case is the same if a female plaintiff marries pending a suit, and afterwards before revivor her husband dies; for then her incapacity to prosecute the suit is removed. After a decree on a bill of interpleader, there is generally an end of the suit as to the plaintiff; and if he dies the cause may proceed without revivor ^o.

There is the same want of accuracy in the books, in ascertaining the manner in which the benefit of a suit may be obtained, after it has become defective or abated by an event subsequent to its institution, as there is in the distinction between the cases where a suit becomes defective merely, and where it likewise abates. It seems, however, clear, that if any property or right, in litigation, vested in a *plaintiff*, is transmitted to another, the person to whom it is transmitted is intitled to supply the defects of the suit, if become defective merely, and to continue it, or at least to have the benefit of it, if abated. It seems also clear, that if any property or right,

^a Treat. on Star-cham. p. ^o 1 Vern. 351.
3. sect. 3. Harl. MSS.

before vested in a *defendant*, becomes transmitted to another, the plaintiff is intitled to render the suit perfect, if become defective, or to continue it, if abated, against the person to whom that property or right is transmitted.

The means of supplying the defects of a suit, continuing it if abated, or obtaining the benefit of it, are, 1. by supplemental bill; 2. by bill of revivor; 3. by bill of revivor and supplement; 4. by original bill in the nature of a bill of revivor; and 5. by original bill in the nature of a supplemental bill. The distinctions between the cases in which a suit may be added to, or continued, or the benefit of it obtained, by these several means, seem to be the following.

1. When any event happens subsequent to the time of filing an original bill ^p, which gives a new interest in the matter in dispute to any person not a party to the bill, as the birth of a tenant in tail; or a new interest to a party, as the happening of some other contingency; or occasions some change of interest, as an assignment of a mortgage; or, in fine, any event, which makes an alteration with respect to any of the claims of any party to the suit, and does not occasion an abatement; the defect in the proceedings may be supplied by a supplemental bill merely ^q. And if by any event the whole in-

^p 1 Atkyns, 291. 3 Atkyns, 217.

^q There are cases which seem to contradict this at-

tersection. See Com. Rep. 589. But this apparent contradiction is perhaps rather in words than in substance.

terest of a *defendant* in the matter in litigation is utterly at an end, but the same interest is become vested in another person not claiming under the former party, whether the suit is by this event become defective merely, or abated as well as become defective, it may be rendered perfect, and continued, by supplemental bill, shewing the manner in which the property has changed from the one to the other. If the interest of a *plaintiff suing in auter droit* entirely determines by death, or otherwise, and some other person thereupon becomes intitled to the same property, under the same title; as in the case of new assignees under a commission of bankrupt, upon the death, or removal, of former assignees ^r; or in the case of an executor, or administrator, upon the determination of an administration *durante minori etate* ^s, or, *pendente lite*, the suit may be likewise added to, and continued, by supplemental bill ^t. In all these cases if the suit has become abated, as well as defective, the bill is commonly termed a supplemental bill in the nature of a bill of revivor, as it has the effect of a bill of revivor in continuing the suit.

Sometimes a supplemental bill becomes necessary, in consequence of a defect in the original bill, or in some part of the proceedings, and not in conse-

^r 1 Atkyns, 88, 89. 3 Atkyns, 218.

^s Prec. in Ch. 175. Car. Rep. 22.

^t In the case of an ad-

ministration determined by death, a bill of revivor by a subsequent administrator has been admitted. 2 Vern. 237. 2 Eq. Ca. Ab. 3, 4.

quence

quence of any event which has occasioned any change of interest in the subject matter of the suit. This happens generally after a decree; and the bill may be in aid of the decree, that it may be carried fully into execution, or that proper directions may be given upon some matter omitted in the original bill ^u, or not put in issue by it, or by the defence made to it ^x; or to bring formal parties before the court ^y. Or it may be used as a ground to impeach the decree, which is the peculiar case of a supplemental bill in the nature of a bill of review, of which it will be necessary to treat more at large in another place. A supplemental bill may likewise be brought to obtain a farther discovery ^z from a defendant, where the proceedings are in such a state that the original bill cannot be amended for that purpose ^a.

2. Wherever a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted to that representative which the law gives or ascertains, as an heir at law, executor, or administrator; so that the title cannot be disputed, at least in the court of chancery, but the person in whom the title is vested is alone to be ascertained; the suit may be continued by bill of revivor merely. If a suit abates by marriage of a female plaintiff, and no act is done to affect the

^u 3 Atkyns, 133.

^x 3 Atkyns, 110.

^y 3 Atkyns, 217.

^z 2 Ch. Rep. 142.

^a 3 Atkyns, 370

rights of the party but the marriage, no title can be disputed; the person of the husband is the sole fact to be ascertained, and therefore the suit may be continued in this case, likewise, by bill of revivor merely.

3. But if by any act besides the marriage, as a settlement, the rights of the parties are affected, though a bill of revivor merely may continue the suit, so as to enable the parties to prosecute it, yet to bring before the court the whole matter necessary for its consideration, the parties must, by supplemental bill, added to, and made part of their bill of revivor, shew the settlement, or other act, by which their rights are affected. And in the same manner, if any other event which occasions an abatement, is accompanied, or followed, by any matter which becomes necessary to be stated to the court to shew the rights of the parties, or to obtain the full benefit of the suit, beyond what is merely necessary to shew by or against whom the cause is to be revived, that matter must be set forth by way of supplemental bill added to the bill of revivor.

4. If the death of a party whose interest is not determined by his death, is attended with such a transmission of his interest, that the title, as well as the person intitled, may be litigated in this court; as in the case of a devise of a real estate ^b; the suit is not permitted to be continued by a bill of revivor.

^b 1 Ch. Ca. 123. 174. 3 Ch. Rep. 39. Mosely, 44.

An original bill, upon which the title may be litigated ^c, must be filed ; and this bill will have so far the effect of a bill of revivor, that if the title of the representative substituted by the act of the deceased party is proved, or admitted by the persons having right to contest it, the same benefit may be had of the proceedings upon the former bill, as if the suit had been continued by a bill of revivor ^d. Where a suit became abated after a decree signed and inrolled, it was anciently the practice to revive the decree by a subpoena in the nature of a *scire facias* ; but if there had been any proceedings subsequent to the decree, this process was ineffectual ^e, and it is now become the practice, in all cases, to revive by bill.

5. If the interest of a plaintiff or defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person not claiming under him ; as in the case of an ecclesiastical person succeeding to a benefice, or a remainder-man in a settlement becoming intitled upon the death of a prior tenant under the same settlement ^f ; the suit cannot be continued by bill of revivor, or its defects supplied by a supplemental bill. For though the successor in the first case, and

^c 1 Eq. Ca. Ab. 2 Marg.
2 Freem. 132.

^e 2 Ch. Rep 67. 2 Eq. Ca.
Ab. 180.

^d 1 Vern. 427. 2 Vern.
548. 672. 2 Brown. Parl.
Ca. 529. 1 Eq. Ca. Ab. 83.

^f 2 Eq. Ca. Ab. 3. 2
Brown. Parl. Ca. 320. 454,
455.

the

the remainder-man in the second, have the same property which the predecessor, or prior tenant, enjoyed; yet they are not in many cases bound by his acts, nor have they in some cases precisely the same rights. But, in general, by an original bill, in the nature of a supplemental bill, the benefit of the former proceedings may be obtained. If the party whose interest is thus determined was not the sole plaintiff, or defendant; or if the property, which occasions a bill of this nature, affects only a part of the suit, the bill, as to the other parties, and the rest of the suit, is supplemental merely. --- There seems to be this difference between an original bill in the nature of a bill of revivor, and an original bill in the nature of a supplemental bill. Upon the first, the benefit of the former proceedings is absolutely obtained, so that the pleadings in the first cause, and the depositions of witnesses, if any have been taken, may be used in the same manner as if filed or taken in the second cause ^f; and if any decree has been made in the first cause, the same decree shall be made in the second ^g. But in the other case, a new defence may be made; the pleadings and depositions cannot be used in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage, than as it may be an inducement to the court to make a similar decree.

Having considered generally the distinctions between the several species of bills, by which a suit,

^f 1 Atk. 89. ^g 2 Vern. 548. 672. 1 Eq. Ca. Ab. 83.
become

become defective, or abated, may be added to, or continued, or the benefit of it obtained; it will remain in this place to consider more particularly the frame of the three first of those species of bills. The other two will form part of the subject to be considered under the next head.

1. A supplemental bill must state the original bill, and the proceedings thereon; and if the supplemental bill is occasioned by any event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties; and, in general, the supplemental bill must pray, that all the defendants may appear and answer to the charges it contains. For the cause must be heard upon the supplemental bill at the same time that it comes on to be heard upon the original bill, if it has not been before heard; and if the cause has been before heard, it must in general, if not always, be farther heard upon the supplemental matter ^b. If indeed the alteration or acquisition of interest happens to a defendant, or a person necessary to be made a defendant, the supplemental bill may be exhibited against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only ⁱ; unless, which is frequently the case, the interests of the other defendants may be affected by that decree. Where a supplemental bill is merely for the purpose of

^b 3 Atkyns, 217.

ⁱ 3 Atkyns, 217.

bringing

bringing formal parties before the court, the parties to the original bill need not be made parties to the supplemental ^k.

2. A bill of revivor must state the original bill, and the several proceedings thereon, and the abatement; it must shew a title to revive ^l, and charge that the cause ought to be revived, and stand in the same condition, with respect to the parties in the bill of revivor, as it was in with respect to the parties to the original bill at the time the abatement happened; and it must pray that the suit may be revived accordingly. It may be likewise necessary to pray, that the defendant may answer the bill of revivor; as in the case of a requisite admission of assets ^m. And if a defendant to an original bill dies before putting in an answer, the bill of revivor, though requiring in itself no answer, must yet pray, that the person against whom it seeks to revive the suit may answer the original bill.

Upon a bill to revive only, the defendants must answer in eight days after appearance, and submit that the suit shall be revived, or shew cause to the contrary; and in default the suit may be revived without answer, by an order made upon motion as a matter of course. The ground for this is an allegation, that the time allowed the defendants to answer by the course of the court is expired, and that no answer is put in: it is therefore presumed that

^k 3. Atkyns, 217.

^m Prac. Reg. 45.

^l Com. Rep. 590.

the defendant can shew no cause against reviving the suit in the manner prayed by the bill.

After a decree a defendant may file a bill of revivor, if the plaintiffs, or those in their right, neglect to do it ^a. For then the rights of the parties are ascertained, and plaintiffs and defendants are equally intitled to the benefit of the decree, and equally have a right to prosecute it ^b. The bill of revivor in this case, therefore, merely substantiates the suit, and brings before the court the parties necessary to see to the execution of the decree, and to be the objects of its operations, rather than to litigate the claims made by the several parties in the original pleadings ^c. In the case of a bill by creditors on behalf of themselves and other creditors, any creditor is intitled to revive ^d. A suit, become entirely abated, may be revived as to part only of the matter in litigation, or may be revived as to part by one bill, and as to other part by another. As if the rights of a plaintiff in a suit upon his death become vested, part in his real, and part in his personal representatives; the real representative may revive the suit, so far as concerns his title, and the personal, so far as his demand extends ^e.

3. A bill of revivor and supplement is merely a compound of those two species of bills, and in its separate parts must be framed and proceeded upon in the same manner.

^a Prec. in Ch. 197. 1 Eq. Ca. Ab. 2.

^b 1 Eq. Ca. Ab. 2. Finch v. Lord Winchelsea.

^c See, however, 3 Atkyns, 691.

^d 1 Eq. Ca. Ab. 3.

^e 1 Eq. Ca. Ab. 3, 4.

III. Bills in the nature of original bills, though occasioned by former bills, are of eight kinds. 1. Cross bills. 2. Bills of review, to examine and reverse decrees signed and inrolled. 3. Bills in the nature of bills of review, to examine and reverse decrees, either signed and inrolled, or not, brought by persons not bound by the decree. 4. Bills impeaching decrees upon the ground of fraud. 5. Bills to carry decrees into execution. 6. Bills in the nature of bills of revivor. 7. Bills in the nature of supplemental bills. And 8. Bills filed by the particular direction of the court.

1. A cross bill is a bill brought by a defendant against a plaintiff, or other parties in a former bill depending, touching the matter in question in that bill. A bill of this kind is usually brought to obtain, either a necessary discovery, or full relief to all parties. It frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree, without a cross bill, or cross bills, to bring every matter in dispute completely before the court, litigated by the proper parties, and upon proper proofs. In this case it becomes necessary for some or one of the defendants to the original bill, to file a bill against the plaintiff and other defendants in that bill, or some of them, and bring the litigated point properly before the court. A cross bill should state the original bill, and proceedings thereon, and the rights of the party exhibiting the bill, or the ground on

D

which

which he resists the claims of the plaintiff in the original bill. But a cross bill being generally considered as a defence ^s, or as a proceeding to procure a complete determination of a matter already in litigation in the court, the plaintiff is not, at least as against the plaintiff in the original bill, obliged to shew any ground of equity to support the jurisdiction of the court ^t.

2. The object of a bill of review is, to procure an examination and reversal of a decree made upon a former bill, and signed by the person holding the great seal, and inrolled ^u. It may be brought upon error of law appearing ^x in the body of the decree itself ^y, or upon discovery of new matter. In the first case the decree can only be reversed upon the ground of the apparent error ^z; as if an absolute decree be made against a person, who upon the face of it appears to have been an infant ^a. A bill of this nature may be brought without the leave of the court previously given ^b. But if it is sought to reverse a decree, signed and inrolled, upon discovery of some new matter ^c, the leave of the court must be first obtained ^d. This will not be granted, but upon allegation upon oath, that

^s 3 Atkyns, 812.

^t Hardres, 160.

^u Tothill, 47. Bob. Curs. Canc. 353.

^x 1 Ch. Ca. 54.

^y 1 Roll. Ab. 382. Prec. in Ch. 260. 3 P. Wms. 371.

^z Tothill, 41. 1 Ch. Rep.

231. Nelf. Rep. 86. Prac. Reg. 50. 4 Vin. Ab. 414.

^a Prac. Reg. 196.

^b 2 Atkyns, 534.

^c 2 Vesey, 576. 3 P. Wms.

371. Nelf. Rep. 52.

^d Tothill, 42.

the new matter discovered could not possibly be had, or used, at the time when the decree was made ^e. If the court is satisfied that the new matter is relevant and material, and such as might probably have occasioned a different determination ^f, a bill of review will be permitted to be exhibited ^g. If upon a bill of review a decree has been reversed, another bill of review may be brought upon the decree of reversal ^h. But when twenty years have elapsed from the time of pronouncing a decree, and the decree has been signed and inrolled, a bill of review cannot be brought ⁱ. In a bill of this nature it is necessary to state ^k the former bill, and the proceedings thereon ; the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it ^l; and the ground of law, or new matter discovered, upon which he seeks to impeach it. The bill may pray, simply, that the decree may be reviewed, and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may also pray the farther decree of the court, to put the party complaining of the former decree into the situation in which he would have been, if that decree had not been carried into exe-

^e 2 Brown. Parl. Ca. 109.
Prac. Reg. 51.

^f 1 Vesey, 432.

^g 1 Vesey, 430.

^h 2 Chan. Pract. 633.

ⁱ 1 Brown. Parl. Ca. 95.

^k 3 Ch. Rep 45. 2 Prax.
Alm. Cur. Canc. 520. 2
Chan. Prac. 629.

^l 4 Vin. Ab. 414. Pl. 5.

cution. If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand ^m. The bill may also, if the original suit has become abated, be at the same time a bill of revivor ⁿ. A supplemental bill may likewise be added, if any event has happened which requires it ^o.

To render a bill of review necessary, the decree sought to be impeached must have been signed and inrolled. If, therefore, this has not been done, a decree may be examined and reversed upon a species of supplemental bill, in nature of a bill of review, where any new matter has been discovered since the decree ^p. A decree not signed and inrolled, being liable to be altered upon a re-hearing, and not requiring a bill of review if there is sufficient matter to reverse it appearing upon the former proceedings, the investigation of the decree must be brought on by a petition of re-hearing ^q; and the office of the supplemental bill, in nature of a bill of review, is, to supply the defect which occasioned the decree upon the former bill ^r. It is necessary to obtain the leave of the court to bring a supplemental bill of this nature ^s.

^m 2 Chan. Prac. 634.

^q 2 Vesey, 598.

ⁿ 2 Prax. Alm. Cur. Canc.

^r 2 Atkyns, 177.

57.

^s Order 17, Off. 1741.

^o 1 Vern. 135.

Rules and Orders in Ch.

^p 2 Atkyns, 40. 3 Atkyns, 811.

107. 2 Atkyns, 139. 3 Atkyns, 811. 2 Vesey, 571. 596.

3. If a decree is made against a person who had no interest at all in the matter in dispute, or had not such an interest as is sufficient to render the decree against him binding upon some person claiming after him, relief may be obtained against error in the decree by a bill in the nature of a bill of review. Thus if a decree is made against a tenant for life only; a remainder-man in tail, or in fee, cannot defeat the proceedings against the tenant for life, but by a bill, shewing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accruer of his own interest; and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose that the other party may appear to, and answer, this new bill, and that the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without the leave of the court.

4. If a decree has been obtained by fraud, it may be impeached by original bill [†] without the leave of the court [‡]. There do not appear in the books many instances of such a bill, in cases of direct fraud in obtaining a decree; but it seems to have been considered, that where a decree has been made

[†] 2 P. Williams, 73. 3 P. Wms. 111. 1 Brown. Parl. Ca. 414. [‡] 3 Atkyns, 811. Rep. Temp. Talbot, 201.

against a trustee, the cestui que trust not being before the court, and the trust not discovered ; or against a person who has made some conveyance, or incumbrance, not discovered ; or where a decree has been made in favour of, or against, an heir, when the ancestor has in fact disposed by will of the subject matter of the suit ; the concealment of the trust, or subsequent conveyance, or incumbrance, or will, in these several cases, ought to be treated as a fraud ^v.

5. Sometimes from the neglect of parties, or some other cause, it becomes impossible to carry a decree into execution, without the farther decree of the court ^v. This happens, generally, in cases where the parties having neglected to proceed upon the decree, their rights become so embarrassed by a variety of subsequent events, that it is necessary to have the decree of the court to settle and ascertain them. Sometimes such a bill is exhibited by a person who was not a party, nor claims under any party, to the original decree ; but claims in a similar interest, or is unable to obtain the determination of his own rights till the decree is carried into execution. Or it may be brought by, or against, a person claiming as assignee of a party to the decree ^z. A bill for this purpose is, generally, partly an original bill, and partly a bill in the nature of an

^v 1 Ch. Ca. 151, 152. 3 Ch. Vern. 409.

Rep. 95.

^z 1 Ch. Ca. 231.

^v 2 Ch. Rep. 128. 2

original bill, though not strictly original. Sometimes it is likewise a bill of revivor, or a supplemental bill, or both.

6. It has been already mentioned ^a, that when the interest of a party dying is transmitted to another, in such a manner that the transmission may be litigated in this court; as in the case of a devisee; the suit cannot be revived by, or against, the person to whom the interest is so transmitted. But that such person, if he succeeds to the interest of a plaintiff, is intitled to the benefit of the former suit; and if he succeeds to the interest of a defendant, the plaintiff is intitled to the benefit of a former suit against him; and that this benefit is to be obtained by an original bill in nature of a bill of revivor. A bill for this purpose must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party dead has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it. A bill of this nature is said to be original, merely for want of that privity of title between the party to the former, and the party to the latter bill, though claiming the same interest, as would have permitted the continuance of the suit by bill of revivor. Therefore the party to the new bill shall be equally bound by, or have advantage of, the proceedings on the original bill, as if there had been such a privity be-

^a P. 27.

tween him, and the party to the original bill claiming the same interest ^b.

7. It has been also mentioned ^c, that if the interest of a plaintiff, or defendant, suing or defending in his own right, wholly determines, and the same property becomes vested in another person, not claiming under him; the suit cannot be continued by a bill of revivor, or its effects supplied by a supplemental bill. But that by an original bill in the nature of a supplemental bill, the benefit of the former proceedings may be obtained. A bill for this purpose must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become intitled. It must then shew the ground upon which the court ought to grant the benefit of the former suit to or against the person so become intitled; and pray the decree of the court adapted to the case of the plaintiff in the new bill ^d. This bill, though partaking of the nature of a supplemental bill, is not an addition to the original bill, but another original bill, which in its consequences may draw to itself the advantage of the proceedings on the former bill.

8. Upon hearing a cause it sometimes appears,

^b 2 Vern. 548. 671. Prec.
in Ch. 134. 3 Brown. Parl.
Ca. 529.

^c P. 28.

^d 2 Brown. Parl. Ca. 320.

that the suit already instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of all the parties. This frequently happens where persons in opposite interests are co-defendants, so that the court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject matter of the suit. In such a case, if upon hearing the cause the difficulty appears, and a cross bill has not been exhibited to remove the difficulty, the court will direct a bill to be filed, in order to bring all the rights of all the parties fully, and properly, for its decision; and will reserve the directions, or declarations, which it may be necessary to give, or make, touching the matter not fully in litigation by the former bill, until this new bill is brought to a hearing^c.

IV. Informations in every respect follow the nature of bills, except in their style. When they concern the rights of the crown, or of those for whom it is a trustee, they are exhibited in the name of the king's attorney, or solicitor-general, as the informant. But where a relator is named, and the rights of the crown are not immediately concerned, the relator in reality sustains and directs the suit; and sometimes having an interest in the matter in dispute, is at the same time relator, and plaintiff. In this case the pleading is styled an information and

bill. An information concerning the rights of the queen, is exhibited also in the name of her attorney-general. The proceedings upon an information can only abate by the death or determination of interest of the defendant. And if there are several relators, the death of any of them, while there survives one, will not affect the suit. But if all the relators die, or if there is but one, and that relator dies, the court will not permit any farther proceeding till an order has been obtained for liberty to insert the name of a new relator, and such name is inserted accordingly. Otherwise there would be no person liable to pay the costs ^e of the suit, in case the information should be deemed improper, or for some other reason should be dismissed.

Many of the matters requisite to the sufficiency of the several species of bills, must necessarily be considered at the same time, with the advantages which may be taken of their insufficiencies, and will be consequently part of the subject of the following book.

^e 1 Vesey, 72. 2 Vesey, 327.

BOOK THE SECOND.

OF THE DEFENCE TO BILLS, AND OF REPLICATIONS.

CHAPTER I.

Of the Defence to Bills.

EVERY bill, except a bill praying the writ of certiorari to remove a cause from an inferior court of equity, requires an answer upon oath to the several charges it contains. The defence to the bill must therefore be made in that manner, unless the defendant will disclaim all right to the matters in question by the bill, or such part thereof to which he makes no other defence; or unless he can shew some ground upon which he can dispute the right of the plaintiff to compel an answer to the charges in the bill, or to some of them. This may be done, either by shewing the insufficiency of the facts alleged in the bill to compel an answer, or that for some reason apparent on the bill, or some consequence of law to be drawn from matter apparent on the bill, the defendant ought not to be compelled to answer; or by shewing some matter of fact not apparent on the bill, by reason of which the defendant ought not to be compelled to answer. The first
of

of these exceptions to a bill, arising from matter apparent on the face of it, is termed a demurrer; the second exception, arising from some fact shewn by the defendant, is termed a plea. If no exception can be shewn, or if the exceptions go to part of the bill only, the defendant must upon oath answer the bill, or such part of it to which he can shew no exception to avoid the necessity of an answer.

It has been repeatedly observed that the most usual bills are such as seek the decree of the court touching some right claimed by the person exhibiting the bill, in opposition to the rights claimed by the person against whom the bill is exhibited; and bills of this nature always seek from the defendant a discovery of the facts charged. This discovery the defendant must make by way of answer, unless he can avail himself of some exception to the bill. An answer must confess and avoid, or traverse and deny, the material points in the bill^f; that is, such matters as are necessary to substantiate the proceedings, and make them regular and effectual in a court of equity; and all facts material to the plaintiff's case, and to enable him to obtain a decree. This is required, as well to supply proof which cannot otherwise be procured, as in aid of proof which may be procured, and to avoid expence^g. In some particulars the several other kinds of bills do not require so extensive a defence, and almost each dis-

^f 2 West. Symb. Chan. 104. § 2 Verzey 492.
^g 12 Reg. 6.

tinct species of bills requires some defence particular to itself. There are likewise persons incapable *by themselves* of defending a suit. In treating therefore of the defence which may be made to a bill it will be proper to consider, I. What persons are capable, and what persons are incapable, *by themselves* of defending a suit. II. The nature of the various modes of defence; under which head will be considered, 1. demurrers, 2. pleas, 3. answers and disclaimers, or any two or more of them, jointly, each referring to a separate and distinct part of the bill.

C H A P. II.

Of the Persons capable, and incapable, by themselves of defending a Suit.

ALL persons capable *by themselves* of instituting a suit, are likewise capable *by themselves* of defending one. If the interest of the crown, or of those for whom it is a trustee, is concerned; the king's attorney-general, or, during the vacancy of that office, the solicitor-general, becomes a necessary party to defend that interest. The queen's attorney, or solicitor-general, seems to be the party necessary to support her rights^h. Infants, idiots, and lunatics, who are incapable by themselves of instituting a suit, are likewise incapable by themselves

^h See 2 Roll. Ab. 213.

of defending one. But married women, who cannot by themselves institute a suit, may defend by themselves, separately from their husbands, with the leave of the court.

Infants institute a suit by their next friend; but to defend a suit the court appoints them guardians, who are usually their nearest relations, not concerned in point of interest in the matter in question. If a person is by age, or infirmities, reduced to a second infancy, he may also defend by guardian¹. Idiots, and lunatics, defend by their committees. If a married woman claims in opposition to any claim of her husband, or if she lives separate from him^k, or disapproves the defence he wishes her to make^l, she may obtain an order for liberty to defend the suit separately from her husband.

C H A P. III.

Of the Nature of the various Modes of Defence to a Bill, and first of Demurrers.

THE person against whom the bill is exhibited, being called upon to answer the complaint made against him, may defend himself, 1. By demurrer, by which he demands the judgement of the court whether he shall be compelled to answer

¹ Prec. in Chanc. 329.

^k Prec. in Ch. 329.

Tothill, 75.

^l 2 Atkyns 50.

the bill or not^m. 2. By plea, whereby he shews some cause why the suit should be dismissed, delayed, or barredⁿ. 3. By answer, which confesses and avoids, or traverses and denies, the several parts of the bill^o. 4. By disclaimer, which at once terminates the suit, the defendant disclaiming all right in the matter sought by the bill^p. 5. By demurrer, plea, answer, and disclaimer, or by any two or more of them, each of which must relate to separate and distinct parts of the bill.

A defendant may take advantage of many defects in a bill, if they are evident upon the face of it, by way of demurrer. Many, therefore of the requisites to the sufficiency of the different kinds of bills will necessarily be considered at the same time with the various causes of demurrer.

A demurrer is an allegation of a defendant, which, admitting the matters of fact^q, or some of them, alledged by the bill, to be true, shews, as they are therein set forth, they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer^r; or that for some reason apparent on the face of the bill, or because of some omission therein, or of the want of some circumstance which ought to be attendant thereon, the defendant ought

^m Prac. Reg. 131.

ⁿ Prac. Reg. 273.

^o 2 West. Symb. Chan. 194.
Prac. Reg. 6.

^p Prac. Reg. 141.

^q A demurrer confesses matter of fact only, and not matter of law. *Ld. Raym.* 18.

^r Prac. Reg. 131.

not to be compelled to answer. It therefore demands the judgement of the court whether the defendant shall be compelled to make answer to the plaintiff's bill, or to some certain part thereof^s. The causes of demurrer are merely upon matter in the bill^t, or upon the omission of matter which by the rules of the court ought to be therein, or attendant thereon; and not upon any foreign matter alleged by the defendant. The principal ends of a demurrer are, to avoid a discovery which may be prejudicial to a defendant, to cover a defective title, or to prevent unnecessary expence. If no one of these ends is obtained, there is little use in a demurrer. For, in general, if a demurrer would hold to a bill, though the defendant answers, the court will not grant relief upon hearing the cause. There are, however, cases in which the court will grant relief upon hearing, though a demurrer to the relief would have been allowed^u. These are principally, where the defendant having submitted to answer, and the cause having proceeded regularly to a hearing, no expence would be avoided by dismissing the bill. But the cases are rare.

The most usual bills, as has been already observed, are such as seek the decree of the court touching some right claimed by the plaintiff, in opposition to some right claimed by the defendant. The defence

^s 3 P. Wms. 80. Prac. Reg. 132.

^t Prac. Reg. 132.

^u 3 P. Wms. 50.

to a bill of this nature is consequently, likewise, most usual, and is also in general the most extensive. In treating, therefore, of demurrers with reference to this species of bills, the nature of demurrers in general must necessarily be considered. Mere bills of discovery differ little from the first species of bills, except that they pray no relief; for every bill, except a certiorari bill, is in fact a bill of discovery. The nature of demurrers in general, and the principal causes of demurrer, may therefore be considered with reference only to the first species of bills, and to bills for discovery merely. The peculiar distinct causes of demurrer, incident to the several other kinds of bills, may be afterwards taken notice of.

Demurrers to the first species of bills are sometimes both to the discovery sought and to the relief prayed by the bill, or to part of the discovery and relief; sometimes to the relief only, or part of the relief; and sometimes to the discovery only, or part of the discovery. Sometimes also a demurrer is an advantage taken of some slip, inaccuracy, or mistake, in the bill. The several causes of demurrer to the first species of bills may therefore be considered under the following heads. 1. Demurrers to the relief prayed by a bill, which frequently include a demurrer to the discovery sought. 2. Demurrers to the discovery only, or part of the discovery, which sometimes consequentially affect the relief. 3. Demurrers upon some slip, inaccuracy, or mistake, in a bill. Under some of these heads many of the

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causes of demurrer to bills of discovery merely will necessarily be treated of; and under a fourth head may be considered the peculiar causes of demurrer to that species of bills.

I. The causes of demurrer to the relief sought by a bill, which will generally include a demurrer to the discovery, are principally these^r. 1. That the plaintiff is incapable *alone* of instituting a suit. 2. The want of proper parties to the suit. 3. The want of privity between the plaintiff and defendant. 4. The want of proper title in the plaintiff to the thing demanded. 5. That the plaintiff shews an unlawful claim. 6. The want of equity in the plaintiff's case, apparent on the bill. 7. That the plaintiff hath full remedy at law. 8. That the plaintiff hath full remedy in the ecclesiastical court. 9. That the relief prayed by the bill is against a proceeding at law upon a criminal prosecution, or upon a mandatory writ. 10. That the plaintiff ought to have established his right at law before he filed his bill. 11. That the plaintiff demands things of several natures against several defendants by the same bill. 12. That the bill is brought for part of a matter only. 13. That the plaintiff shews no claim of interest in the defendant in the thing demanded by the bill. 14. That the bill

^r It is said a defendant may demur to a bill, if it appears upon the face of it to be brought for a very small sum; but it is most usual to apply to the court that the bill may be dismissed. *Mosely* 47. 356. *Bunbury* 17.

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shews no ground to charge the defendant with the plaintiff's demand.

1. If an infant, or a married woman, an idiot, or a lunatic, exhibiting a bill, appear upon the face of it to be thus incapable of instituting a suit *alone*, and no next friend or committee is named in the bill, the defendant may demur. But if the incapacity does not appear upon the face of the bill, the defendant cannot take advantage of it by way of demurrer. This advantage may be taken as well in the case of a bill for a discovery merely, as in the case of a bill for relief. For the defendant in a bill for a discovery merely, being always intitled to costs after a full answer as a matter of course, would be materially injured, by being compelled to answer a bill exhibited by persons, whose property is not in their own disposal, and who are therefore incapable of paying the costs.

2. All persons materially interested in the matter in dispute ought to be parties to the suit, plaintiffs, or defendants, however numerous they may be, so that a complete decree may be made between those parties. In some cases ^a, as in the instance of creditors, seeking an account of a real and personal estate for payment of their demands, a few, suing on behalf of the rest, may substantiate the suit ^b; and the other creditors may come in under

^a Prec. in Ch. 592. Gilb. 230.

^b 2 Vezey 312. 313.

the decree. But if a husband sues alone, for a legacy given to his wife^c; if one joint-tenant sues without the other^d; if a bill be brought against the heir only, where the personal estate is first liable to answer the plaintiff's demand^e; and in many other cases^f; the want of proper parties is a good cause of demurrer. In some cases, however, where all the persons interested are not made parties, yet if there is such a privity between the plaintiffs and defendants, that a complete decree may be made, the want of parties shall not be a cause of demurrer. As if a bill is brought by a lord of a manor against some of the tenants, or by some of the tenants against the lord, upon a question of common; or by a parson for tithes against some of the parishioners; or by some of the parishioners against the parson, to establish a general modus^g. And if a sufficient reason for not bringing a necessary party before the court is suggested by the bill; as if the party is resident out of the jurisdiction of the court, and that fact is charged^h; or if a personal representative is a necessary party, and the representation is charged

^c 1 Ch. Ca. 41. Nelf. Rep. 78.

^d Rep. Temp. Finch, 82.

^e 3 P. Wms. 331. 2 Atkyns, 51.

^f Rep. Temp. Finch, 4. 113. 202. 3 P. Wms. 311.

note (I.) 1 Atkyns, 290. Nelf. Rep. 93. 1 Eq. Ca. Ab. 72. 2 Eq. Ca. Ab. 165.

^g 1 Atkyns, 283. Contr. 2 Eq. Ca. Ab. 170.

^h Prec. in Ch. 83. 2 Atkyns, 510.

to be in litigation in the ecclesiastical court ^h; a demurrer will not hold. So, too, if the bill seeks a discovery of the parties interested in the matter in question, a demurrer, for want of the necessary parties, will not hold ⁱ.

A demurrer for want of parties must shew, who are the proper parties: not indeed by name, for that might be impossible; but in such manner, as to point out to the plaintiff the objection to his bill, and enable him to amend, by adding the proper parties. In the case of a demurrer for want of parties, the court has permitted the plaintiff to amend, when the demurrer has been held good upon argument ^k.

3. A demurrer may be to a bill, for want of privity between the plaintiff and defendant. But a principal has a right to a discovery of his agent's transactions; and therefore if a factor is employed to sell the goods of a merchant, the merchant may file a bill against the persons to whom the goods have been sold, for an account, and to be paid the money for which the goods have been sold, if it is not already paid to the factor; and a demurrer to such a bill has been over-ruled ^l.

4. A demurrer may also be for want of proper title in the plaintiff to the thing demanded ^m: as where persons, who had obtained letters of administration in a foreign court, sought an account of

^h 2 Atkyns, 51.

^l 2 Atkyns, 394.

ⁱ 1 Vern. 95.

^m 1 Vern. 39.

^k 2 Ch. Ca. 197.

personal estate^a; or where a protestant next of kin claimed a rent-charge, settled on a papist upon her marriage^o. In the first case the plaintiffs did not shew a complete title; for though they might have a right to administration in the proper ecclesiastical court in England, they did not shew that they had obtained it. In the second case the plaintiff had evidently no right; for the papist was then incapable of taking by purchase, and therefore the grant of the rent-charge was utterly void. So if a plaintiff claims under a will, and it is apparent upon the construction of the will that he has no title, the defendant may demur^p. But if upon arguing the demurrer the court is not satisfied, and is desirous the matter should come more fully to be debated at a deliberate hearing, the demurrer may be over-ruled, without prejudice to the defendant's insisting on the same matter by way of answer^q.

If the bill does not shew in the plaintiff a title in the thing demanded, he has as little right to a discovery, as to relief. Thus if a bill is brought to discover a will, and the plaintiff does not intitle himself as devisee, or heir, or otherwise^r; or if a bill is brought for discovery of a personal estate, and the plaintiff does not intitle himself as executor, or administrator, or otherwise^s; a demurrer will hold. The

^a 3 P. Wms. 371.

^o 2 Atkyns, 210.

^p 2 Vezey, 247. Prec. in Ch. 589.

^q 2 Vezey, 247.

^r Rep. Temp. Finch, 36.

^s Rep. Temp. Finch, 44.

case is the same if a bill is brought by a person having title, but not a perfect title; as by an executor, who does not appear by the bill to have proved the will of his testator^t, or who appears to have proved it in an improper^u or insufficient^x court. But if the plaintiff shews a complete title, though a litigated one, or one that may be litigated; as that of an administrator, where a suit is depending to revoke the administration^y; or of an administrator where there may be another personal representative^z; he has the same right to a discovery, as if his title to the thing in demand was not litigated, or doubtful. For in the first case, till the litigation is determined his title is good; and in the second case, the court will not consider the ecclesiastical court as having done wrong. It has been determined too, that where no will has been proved, nor administration granted, but the matter is pending in the ecclesiastical court, a demurrer of one of the parties possessed of the personal estate, to a bill for an account filed by the other party, shall be over-ruled: for the ecclesiastical court has no means of securing the effects while the suit there is depending^a. But if a plaintiff has merely a probability of future title, upon an event which

^t 1 P. Wms. 752.

^u 3 P. Wms. 371.

^x 1 P. Wms. 766.

^y 1 Vern. 106.

^z 3 P. Wms. 370.

^a 1 Atkyns, 286. And see

² Brown Parl. Ca. 476.

may never happen, a demurrer for want of title will hold ^c.

5. If the claim of the plaintiff is of a matter in itself unlawful; as of money promised to a counsel-
lor at law for advice and pains in carrying on a
suit ^d; or of money bequeathed by a will to pur-
chase a dukedom ^e; the defendant may demur to the
bill. This is equally a ground of demurrer to a
bill for a discovery merely, as to a bill for relief.

6. A want of equity in the plaintiff's case appa-
rent on the bill is a sufficient ground for a demur-
rer ^f. Upon the same ground, if a bill is brought
for discovery of deeds, or writings, suggesting that
they are in the custody or power of the defendant,
or lost, and any other relief is prayed than the de-
livery of the deeds, or writings, a demurrer will
hold; except the plaintiff annexes to his bill an affi-
davit that the deeds or writings are not in his cus-
tody or power, and that he knows not where they
are, unless they are in the hands of the defendant.
For such a bill does, by consequence, seek to transfer
the jurisdiction from the common law to the court
of equity ^g. But if the bill is brought only for dis-
covery, and delivery of the deeds, such an affidavit
is not necessary ^h. Or if a bill is brought for disco-

^c 1 Vern. 105. 1 Eq. Ca. 11. ^f 1 Vern. 210. 211. 2 Ve-
Ab. 234. *Smith v. Attorney* zey, 571.

General, Michaelmas 1777.

^g 2 P. Wms. 541.

^d Rep. Temp. Finch, 75.

^h 1 Vern. 180. 2 P. Wms.

^e 1 Vern. 5.

541. Nelf. Rep. 78.

very of a cancelled deed, and to have another deed executed ; for if the plaintiff has the cancelled deed in his hands, he can make no use of it at lawⁱ.

7. A demurrer to the relief prayed by a bill, for that the plaintiff hath remedy at law, will only hold where the plaintiff can have as effectual and complete remedy at law, as in equity. Upon this ground a demurrer to a bill for recovery of an ancient silver altar, claimed by the plaintiff as treasure-trove within his manor, was over-ruled. For though the plaintiff might recover at law the value in an action of trover, or the thing itself, if it could be found, in an action of detinue ; yet as the defendant might deface it, and thereby depreciate the value, it was held that the defect of the law in that particular ought to be supplied in equity^k. And although the plaintiff may have remedy at law, yet if it is charged by the bill that any evidence of the plaintiff's demand is in the defendant's custody, or is lost, the defendant must answer. To such bill, however, if it seeks relief, the plaintiff must annex an affidavit that he has not the evidence of the demand in his own custody, or power, or the want of the affidavit will be a sufficient cause of demurrer. And if there is no charge in the bill that the evidence of the demand is not in the plaintiff's custody, or power, the demurrer ought to alledge that there is no such charge in the bill^l. But wherever the remedy at

† Mosely, 192. ^k 3 P. Wms. 390. ^l 3 P. Wms. 395.
law

law is clear, and certain ^m, the court will always allow a demurrer. A defendant, having demurred to a bill for that the plaintiff had full remedy at law, will not be debarred of relief in equity upon another bill, if the plaintiff in the first bill should proceed at law, and recover ⁿ.

8. If a bill is brought for discovery, and relief, in a matter properly cognizable in the ecclesiastical court, a demurrer will be allowed to the relief; and likewise to the discovery, if the ecclesiastical court is capable of obtaining the discovery ^o. As in case a bill is brought to be relieved against a church rate, and to compel a discovery of the value of the respective real and personal estates of the inhabitants of the parishes in which the rate was assessed, and of the application of the money collected ^p.

9. If a bill is brought for relief against a proceeding at law upon a criminal prosecution, or a mandatory writ; as an indictment, an information, a writ of prohibition, a mandamus, or any writ that is mandatory, and not remedial; the defendant may demur. For the court has no jurisdiction ^q, and this being apparent on the face of the bill, the defendant may take advantage of it by demurrer. And though a bill of discovery lies in aid of proceedings in some suits relating to a civil right in a court of

^m 3 Atkyns, 740. See 3 205. 451.

Brown. Parl. ca. 525.

^p 1 Atkyns, 288.

ⁿ 3 P. Wms. 397.

^q 2 Vezey, 398.

^o 1 Atkyns, 288. 2 Vezey,

common law, as an action; yet such a bill will not lie to aid the prosecution of an indictment, or information, or to aid the defence of either^r.

10. Where one general legal right is claimed against several distinct persons, a bill may be brought to establish that right^s. But in most cases the plaintiff ought first to establish his right at law^t. If the right has not the sanction of a long possession, and the plaintiff has any means of trying the matter at law, a demurrer, for that the plaintiff ought to have established the right at law before he brought his bill, will hold^u. But if the plaintiff has not been actually interrupted, or dispossessed, he may bring a bill to examine his witnesses *in perpetuam rei memoriam*, and to establish his right, though he has not recovered in affirmance of it at law; and in such a case a demurrer has been over-ruled^x. However, as bills of this nature are merely received to prevent multiplicity of suits, by determining the rights upon issues directed by the court, instead of putting the plaintiff to sue a number of persons separately at law, where each suit would only determine the peculiar right in question between the plaintiff and defendant, there is no pretence for such a bill where a right is disputed between two persons only, until the right has been tried at law^y.

^r 2 Vezey, 398.

^s 2 Atkyns, 484.

^t 1 Atkyns, 284.

^u 2 Atkyns, 391.

^x 1 Atkyns, 284. Prec in Ch. 531.

^y 2 Atkyns, 484. Prec. in Ch. 261.

11. The court will not permit a plaintiff to demand, by one bill, several matters of different natures against several defendants; for this would tend to load each defendant with an unnecessary burthen of costs, by swelling the pleadings with the state of the several claims of the other defendants, with which he has no connection. A demurrer, therefore, for that the plaintiff demands several matters, of different natures, of several defendants, by the same bill, will hold^z. But as the defendants may combine together to defraud the plaintiff of his rights, and such a combination is always charged by a bill, the defendant must so far answer the bill as to deny combination^a. In this, however, the defendant must be cautious; for if the answer goes farther than merely to deny combination, it will over-rule the demurrer^b. A demurrer of this kind will only hold where the plaintiff claims several matters of different natures; for when one general right is claimed by the bill, though the defendants have separate and distinct rights, yet the demurrer will not hold. As if a person, claiming a general right to the sole fishery of a river, files a bill against several persons claiming several rights in the fishery, as lords of manors, occupiers of lands, or otherwise^c. For

^z 1 Vern. 416. 463 Hardr.

^b 1 Vern. 463.

537.

^c 1 Atkyns, 282.

^a 1 Vern. 416.

in this case the plaintiff does not claim several separate and distinct rights, in opposition to several separate and distinct rights claimed by the defendants; but he claims one general and entire right, though set in opposition to a variety of distinct rights claimed by the several defendants.

12. As the court will not permit the plaintiff to demand by one bill several matters, of different natures, against several defendants, so it will not permit a bill to be brought for part of a matter only; but to prevent the splitting of causes, and consequent multiplicity of suits, will allow a demurrer upon this ground^d.

13. The plaintiff must by his bill shew some claim of interest in the defendant in the thing demanded by the bill, or the defendant may demur^e. As if a bill is filed to have the benefit of, or to impeach, an award, and the arbitrators are made parties; a demurrer of the arbitrators will hold to the whole bill, as well the relief, as the discovery^f. For the plaintiff can have no decree against them, nor can he read their answer against the other defendants. So if a bankrupt is made party to a bill against his assignees touching his estate, he may demur to the relief; for all his interest is transferred to his assignees; but if any discovery is sought of his acts before he became a bankrupt, he must answer to that part of the bill. The plaintiff must likewise

^d 1 Vern. 29. ^e 2 Eq. Ca. Ab. 78. ^f 2 Vern. 380.

shew

shew some claim of interest in the defendant in a bill for a discovery merely^g; for such a bill can only be a bill to gain evidence, and yet the answer of the defendant cannot be read as evidence against any other person, not even against another defendant to the same bill^h. There seems, however, to be an exception to this rule in the case of a corporation. For as a corporation can answer no otherwise than under their common seal, and therefore, though they answer falsely, there is no remedy against them for perjury; it has been usual, where a discovery of entries, or orders in the books of the corporation, or of any acts done by the corporation, has been necessary, to make their secretary, or book-keeper, or other officer, a party; and a demurrer, for that the bill shewed no claim of interest in the defendant, has been in such case over-ruledⁱ. So where bills have been filed to impeach deeds on the ground of fraud, attornies who have prepared the deeds, and other persons concerned in obtaining them, have been frequently made defendants, as parties to the fraud complained of, for the purpose of obtaining a full discovery; and no case appears in the books of a demurrer by such a party, because he had no claim of interest in the matter in question by the bill. Indeed an attorney under such circumstances has been ordered to pay costs^k.

^g 2 Vern. 380. 2 Atkyns, 311. note II.
^{394.} 1 Vezey, 426. ⁱ 3 P. Wms. 312.
^h 2 Vern. 380. 3 P. Wms. ^k 2 Atkyns, 234.

14. If a bill does not shew some ground to charge the defendant with the plaintiff's demand, the defendant may demur. As where a bill was brought, upon some ground of equity, by the obligee in a bond against the heir of the obligor, alledging that he having assets by descent ought to satisfy the bond; because the bill did not expressly alledge that the heir was bound in the bond, although it alledged that the heir ought to pay the debt, a demurrer to discovery of assets was allowed^k. So where a bill was brought against an assignee, to discover a matter touching a breach of a covenant in a lease, and the covenant appeared to be collateral, and not running with the land did not bind assigns; or if it did bind assigns, was not stated by the bill so to do; the assignee demurred, and the demurrer was allowed^l.

But wherever the plaintiff, though not intitled to relief in a court of equity, may yet be intitled to relief in some other court, which cannot compel a discovery upon oath; there, though the defendant may demur to the relief prayed by a bill, he must yet answer to the discovery sought^m.

II. A demurrer to the discovery sought by a bill, sometimes includes, by consequence, a demurrer to the relief, if any is prayed; for without the discovery the plaintiff may not be able to shew his

^k 1 Vern. 180.

^l 1 Vezey, 56.

^m 3 P. Wms. 150. 2 Atkyns, 157.

title to relief. The grounds for a demurrer to a discovery only, are principally, 1. That the discovery will make the defendant liable to pains and penalties. 2. That the discovery will make the defendant liable to forfeiture of interest, or to something in the nature of a forfeiture. 3. That the discovery cannot be material to the relief. 4. That the plaintiff shews no title to the discovery.

1. It is a general rule, that no one is bound to answer so as to subject himself to punishment, in whatever manner that punishment arises, or whatever is the nature of the punishmentⁿ. If therefore a bill requires an answer, which may subject the defendant to any pains, or penalties, he may demur to so much of the bill. As if a bill charges any thing, which, if confessed by the answer, would subject the defendant to any criminal prosecution^o, or to any particular penalties; as an usurious contract^p, maintenance^q, champerty. And in such cases, if the defendant is not obliged to answer the facts, he need not answer the circumstances, though they have not such an immediate tendency to criminate^r. But if the plaintiff is alone intitled to the penalties, and expressly waves them by his bill, the

ⁿ 2 Vezey, 245.

450. 2 Atkyns, 393.

^o 1 Vezey, 246. 2 Vezey,

^q Rep. Temp. Finch, 75. 3

451.

P. Wms. 376.

^p Tothill, 135. 1 Atkyns,

^r 1 Vezey, 247, 248.

defendant shall be compelled to make the discovery; for it can no longer subject him to a penalty. As if a rector, or impropriator, or vicar, files a bill for tythes; he may waive the penalty of the treble value ^s, to which he is intitled by the statute of 2 and 3 Edw. VI. and thus become intitled to a discovery of the tythes substracted.

It is not, however, in every case, that the party shall protect himself against relief in a court of equity, upon an allegation that if he answers the bill filed against him, he must subject himself to the consequences of a supposed crime. But though such an allegation will not create a defence against relief, the court will not force the party by his own oath to subject himself to punishment. And therefore in the case of a bill to enquire into the validity of deeds, upon a suggestion of forgery, the court has entertained jurisdiction of the cause; and though it has not obliged the party to a discovery, yet has directed an issue to try whether the deeds were forged ^t.

It should seem, that a demurrer will also hold to any discovery, which may tend to shew the defendant guilty of any moral turpitude; as the birth of a child out of wedlock ^u. But a mother may in some cases be compelled to discover where her child was born, though it may tend to shew the child to be

^s 1 Vern. 60.

^t 2 Vesey, 246.

^u See, however, 2 Vesey, 451.

an alien ^x; for that is not a discovery of any illegal act, or of any act which can affect the character of the defendant.

2. A demurrer will likewise hold to a bill requiring a discovery, which may subject the defendant to any forfeiture ^y of interest; as if a bill is brought to discover, whether a lease has been assigned without licence; or whether a defendant, intitled during widowhood ^a, or liable to forfeiture of a legacy in case of marriage without consent ^b, is married. But if the plaintiff is alone intitled to the benefit of the forfeiture, and expressly waives ^c it by the bill; as in the case of a bill for discovery of waste ^d; a demurrer will not hold: for the court has a ground of equity to award an injunction, if the plaintiff sues for the forfeiture ^e. And where a devise over of an estate, in case of marriage, is to be considered as a conditional limitation, and not in the nature of a forfeiture, there a demurrer to a bill for a discovery of marriage will not hold ^f.

A defendant may in the same manner demur to a discovery, which may subject him to any thing in the nature of a forfeiture ^g; as where a discovery is sought, whether the defendant was educated in the popish religion, for he incurs the incapacities in the

^x 2 Vesey, 287. 494.

^y Tothill, 69.

^z 1 Vesey, 56.

^a 2 Chan. Rep. 68.

^b 2 Atkyns, 392. 2 Vesey, 265.

^c 1 Vesey, 56.

^d 2 Atkyns, 393.

^e 1 Vesey, 56.

^f 2 Atkyns, 393. 3 At-

kyns, 260. 2 Vesey, 265.

^g 3 Atkyns, 457.

statute 11 and 12 Will. III. ^b; or whether a clergyman was presented to a second living, which avoided the first ⁱ. So a jointress may demur to a bill filed by an heir at law against her for a discovery of her jointure deed, if the plaintiff is not capable of confirming, or the bill does not offer to confirm, the jointure, and the facts appear sufficiently on the face of the bill. But, in general, advantage is taken of this defence by way of plea ^k.

3. A defendant is not compellable to discover any thing immaterial ^l to the relief prayed by the bill. Upon this ground, upon a bill filed by a mortgagor against a mortgagee to redeem, and seeking a discovery whether the mortgagee was a trustee, a demurrer to the discovery was allowed. For as there was no trust declared upon the mortgage, and the defendant was willing to re-convey, free from incumbrances, it was not material to the plaintiff, whether there was any trust reposed in the defendant or not ^m. So where a bill was filed by a lord of a borough, praying, amongst other things, a discovery, whether a person applying to be admitted tenant was a trustee, the defendant demurred ⁿ. And where a bill was brought for a real estate, and sought a discovery of proceedings in the ecclesiasti-

^b Comyn, 661. 3 Bac. Ab. 800, 801. The 18 Geo. III. c. 60. does not entirely remove these incapacities.

ⁱ 3 Atkyns, 453.

^k 2 Vesey, 450.

^l Mosely, 38.

^m Rep. Temp. Finch. 214.

ⁿ 2 Vesey, 396. 399.

cal court upon a grant of administration, the defendant demurred to that discovery, the proceedings in the ecclesiastical court being immaterial to the plaintiff's case ^o. Again, where a bill, to establish an agreement for a separate maintenance for the defendant's wife, prayed a discovery of ill-treatment of the wife to make her recede from the agreement; the defendant demurred to this discovery, as of a matter not properly cognizable or relievable in a court of equity ^p.

4. If a bill seeks a discovery to which the plaintiff shews no title, a defendant may demur to the particular discovery, though not to the rest of the bill. As in the case of a bill filed by a person claiming to be lord of a manor, against another person also claiming to be lord of the same manor, and praying, amongst other things, a discovery in what manner the defendant derived title to the manor; the defendant demurred, because the plaintiff had shewn no title to the discovery, and the demurrer was allowed ^q.

III. The effect of a demurrer put in upon a slip, inaccuracy, or mistake, in a bill, may be immediately destroyed by amending the bill in the particulars objected to, with leave of the court. Demurrers of this sort are principally where some matter of necessary form has been omitted, as the abode of the plaintiff; or of the next friend of an infant, or

^o 2 Atkyns, 388.

^p 1 Vern. 204.

^q Adderley v. Sparrow,
Hilary 1779.

a married woman, plaintiff; or of the relator in an information. The mention of the residence of these persons is necessary, that the defendant may know where to resort to serve process, and for his costs, if finally dismissed.

If the plaintiff can avoid any demurrer whatsoever by amendment of his bill, he may obtain leave to amend it at any time before the demurrer has been argued ^r; but after argument of a demurrer to the whole of a bill, it is not usual to permit an amendment, except in the case of a demurrer for want of parties ^s.

IV. A bill, for a discovery merely, is generally liable to the same grounds of demurrer as any other bill. But a demurrer to a bill for a discovery merely will not hold for want of parties ^t, for the plaintiff seeks no decree; nor, in general, for want of equity in the plaintiff's case, for the same reason; nor because the plaintiff may have remedy at law, for he cannot have the discovery which leads to the remedy; nor because the plaintiff may have remedy in the ecclesiastical court, in cases where he cannot have all the necessary discovery in that court; nor because a bill is brought for discovery of part of a matter, for that is merely a demurrer because the discovery would be insufficient. But it should seem a demurrer would hold to a bill for discovery of several distinct matters, against several distinct defendants. For though a defendant is always eventu-

^r Mosely, 301.

^t 2 Eq. Ca. Ab. 170.

^s 2 Chan. Ca. 197.

ally paid his costs upon a bill of discovery, if both parties live, yet the court ought not to permit him to be put to any unnecessary expence, as either the plaintiff or defendant may die pending the suit.

Although as the species of bills already considered are the most usual, demurrers to such bills are also most usual, yet demurrers will likewise hold to any other species of bills, except a certiorari bill, and generally for the same causes. But some of the different kinds of bills have likewise their own peculiar distinct causes of demurrer.

Thus if to a bill of interpleader the usual affidavit, that the plaintiff does not collude with any of the parties, is not annexed, the defendant may demur ^u. To such a bill there is likewise another cause of demurrer; for if the plaintiff does not shew, that each of the defendants whom he seeks to compel to interplead claims a right, both the defendants may demur; one, because the plaintiff shews no right in the defendant demurring; the other, because the plaintiff, shewing no right in the co-defendant, shews no cause of interpleader ^x. Or if the plaintiff shews no right to compel the defendants to interplead, whatever rights they may claim, each defendant may demur.

To a certiorari bill, as has been already observed, there can be no demurrer; for it requires no answer ^y.

^u 1 Vesey, 248.

^x 1 Vesey, 248.

^y There are in the books many cases apparently to the

contrary; but they seem not to have been cases of bills praying merely the writ of certiorari. See 1 Chan. Ca. 31.

There

There are few cases in which a man is not intitled to perpetuate the testimony of witnesses ², and therefore to such a bill a demurrer will seldom lie. But if upon the face of the bill the plaintiff appears to have no certain right to, or interest in, the matter to which he craves leave to examine, in present, or in future ³, a demurrer will hold. As if a person not claiming under a will should pray leave to perpetuate the testimony of the witnesses to the will; or a person claiming as a devisee in the will of a person living, but a lunatic, should bring a bill to perpetuate the testimony of witnesses to the will, against the presumptive heir at law ^b; or a person who would be next of kin to a lunatic if he were dead intestate, should bring a bill, in the life-time of the lunatic, to perpetuate the testimony of witnesses to his legitimacy, against the attorney-general as supporting the rights of the crown ^c. The parties have, in these cases, no interest in any thing which can be the subject of a suit; they sustain no character under which they can afterwards use the depositions ^d; and therefore the depositions, if taken, would be wholly nugatory. But even where a de-

² 1 Atkyns, 451. 571. 1 fore lord Northington. 2
P. Wms. 117. Prec. in Ch. Prax. Alm. Cur. Canc. 500.
531. 1 Rol. Ab. 383. where there is the form of

^a Smith v. Att. Gen. in such a demurrer.
Chan. Mich. 1777. ^c Smith v. Att. Gen. Mich.

^b 1 Vern. 105. 1 Eq. Ca. 1777.
Ab. 234. Smith v. Watson, ^d See 2 Prax. Alm. Cur.
in Chan. 20 June, 1760, be- Canc. 501.

fendant might demur both to the discovery sought and the relief prayed by a bill, it was held, that to so much of the bill as sought to perpetuate the testimony of witnesses the defendant could not demur ^f.

If a bill of revivor does not shew a sufficient ground for reviving the suit ^g, or any part of it ^h, either by, or against ⁱ, the person by, or against, whom it is brought, the defendant may by demurrer shew cause against the revival ^k. Indeed though the defendant does not demur, yet if the plaintiff does not shew a title to revive, he will take nothing by his suit at the hearing ^l. A demurrer will hold to a bill of revivor brought singly for costs ^m; the court not permitting a suit to be revived for that purpose only, even where the costs have been actually taxed before the abatement happened. If a supplemental bill is brought upon a matter arising before the filing of the original bill, where the suit is in that stage of proceeding that the bill may be amended, the defendant may demur ⁿ. If a supplemental bill is brought upon a matter arising subsequent to the time of the filing the original bill, against a person who was no party to the original bill, and claims no interest arising out of the matters in litigation in the original bill, the defendant to the supplemental bill may also demur; especially if the supplemental

^f 1 Atkyns, 450.

^g 3 P. Wms. 348.

^h 1 Eq. Ca. Ab. 3, 4.

ⁱ 2 Ch. Rep. 244.

^k 3 P. Wms. 348.

^l 3 P. Wms. 348.

^m 2 Eq. Ca. Ab. 3.

ⁿ 3 Atkyns, 817,

bill prays, that he may answer the matters charged in the original bill. These, however, are grounds of demurrer arising rather from the plaintiff's having mistaken his remedy, than from his being without remedy. Original bills, in the nature of bills of revivor, and supplement, are liable to objections of the same nature.

A cross bill having nothing in its nature different from the first species of bills, with respect to which demurrers in general have been considered, except that it is occasioned by a former bill, there seems no cause of demurrer to such a bill, which will not equally hold to the first species of bills. And a demurrer for want of equity will not hold to a cross bill filed by a defendant in a suit, against the plaintiff in the same suit, touching the same matter. For being drawn into the court by the plaintiff in the original bill, he may avail himself of the assistance of the court, without being put to shew a ground of equity to support its jurisdiction ^o, a cross bill being generally considered as a defence ^p.

The constant defence to a bill of review for error apparent upon a decree is, by plea of the decree, and demurrer against opening the enrolment ^q. But where any matter beyond the decree is to be offered against opening the enrolment, as length of time, that matter must be pleaded; otherwise the plaintiff will not have the benefit of exceptions, as in-

^o Hardres, 160.

^p 3 Atkyns, 812.

^q 1 Vern. 392. 2 Atkyns, 534.

fancy,

fancy, coverture, or the like ¹. A bill of review upon the discovery of new matter being exhibited only by leave of the court, the ground of the bill is generally well considered before it is brought; and therefore in point of substance it can rarely be liable to a demurrer. But if brought upon new matter alleged, and the defendant thinks that matter not relevant, probably he might take the advantage of it by way of demurrer, although the relevancy ought to be considered at the time leave is given to bring the bill. If a supplemental bill in nature of a bill of review, is brought upon allegation of a discovery of new matter, and it appears upon the face of the bill that no new matter has been discovered, the defendant may take advantage of it by demurrer ². Bills in the nature of bills of review do not appear subject to any peculiar cause of demurrer, unless the decree sought to be reversed does not affect the interest of the person filing the bill. If upon argument of a demurrer to a bill of review, the demurrer is allowed, and the order allowing it is inrolled, it is an effectual bar to another bill of review ³. If upon the face of a bill to carry a decree into execution, the plaintiff appears to have no right to the benefit of the decree, the defendant may demur.

A bill filed by the direction of the court, for the purpose of obtaining its decree touching some mat-

¹ 2 Vesey, 109. See, how- ² 2 Ch. Ca. 135. 1 Vern.
ever, 1 Brown. Pall. Ca. 95. 135. 4 7. 441. 2 Vern. 120.

³ 2 Atkyns, 40.

ter not in issue by the former bill, or not in issue between the proper parties, does not seem liable to any peculiar cause of demurrer. Indeed, being exhibited by order of the court upon hearing another cause, there is little probability, that such a bill should be liable, in substance, to any demurrer.

In addition to the several particular causes of demurrer applicable to particular kinds of bills, it may be observed, that any irregularity in the frame of a bill of any sort may be taken advantage of by demurrer. Thus if a bill is brought contrary to the usual course of the court, a demurrer will hold ^u. As where after a decree directing incumbrances to be paid according to priority, the plaintiff, a creditor, obtained an assignment of an old mortgage, and filed a bill to have the advantage it would give him by way of priority over the demands of some of the defendants ^x. This was a bill to vary a decree, and yet was neither a bill of review, nor a supplemental bill in nature of a bill of review, which are the only kinds of bills which can be brought to affect or alter a decree ^y, unless the decree has been obtained by fraud ^z. So if a supplemental bill is brought against a person not a party to the original bill, praying that he may answer the original bill, and

^u 3 Atkyns, 809. Bunbury 56.

^x 3 Atkyns, 811. 2 Vesey, 571.

^y 1 Ch. Ca. 44. 2 Freem. 179.

^z 3 Atkyns, 811. Rep. Temp Talb. 201.

no reason is suggested why he could not be made a party to the original bill by amendment, he may demur^a. If an irregularity arises in any alteration of a bill by way of amendment, it may also be taken advantage of by demurrer. As if a plaintiff amends his bill, and states a matter arisen subsequent to the filing of the bill^b, which consequently ought to be the subject of a supplemental bill, or bill of revivor.

Having thus considered the several grounds of demurrer, it may be proper to observe some particulars, which are necessary to be attended to in framing demurrers in general.

A demurrer must be signed by counsel; but is put in without oath, as it asserts no fact, but relies merely upon matter apparent upon the face of the bill. It is therefore considered, that the defendant may, by advice of counsel, upon the sight of the bill only, be enabled to demur thereto^c. For this reason it is always made the special condition of an order for time to demur plead or answer to the plaintiff's bill, that the defendant shall not demur alone. Whenever, therefore, the defendant has obtained an order for time, and is afterwards advised to demur, he must plead to or answer some part of the bill. It has been held, that answering to some fact immaterial to the cause, and denying combination, do not amount to a compliance with the terms of such an order; and therefore, upon

^a 3 Atkyns, 817.

^c Ord. in Ch. 96.

^b 1 Atkyns, 291.

motion,

motion, a demurrer accompanied by such an answer has been discharged ^d. But great inconvenience might arise from this determination, if strictly adhered to. For it often happens that a defendant cannot possibly answer any material part of the bill, without over-ruling his demurrer; it being held, that if a defendant answers to any part of a bill to which he has demurred, he waives the benefit of the demurrer ^e; or if he pleads to any part of a bill before demurred to, the plea will over-rule the demurrer ^f. For the plaintiff may reply to a plea, or answer, and thereupon examine witnesses, and hear the cause; but the proper conclusion of a demurrer is, to demand the judgment of the court, whether the defendant ought to answer to so much of the bill as the demurrer extends to, or not ^g. The condition, that the defendant shall not demur alone, seems now, therefore, considered more liberally; and answering any one fact in a bill, and denying combination, is generally esteemed a compliance with the order. It has been even said, that the court will not incline to discharge the demurrer if the defendant denies combination only, where he cannot answer farther without over-ruling his demurrer ^h. Indeed any material answer must in many cases over-rule the demurrer; so that giving a defendant leave to demur, not demurring alone, is often in effect giving leave to do a thing, but

^d 2 P. Wms. 286.

^e 3 P. Wms. 79. 2 Atkyns, 157.

^f 2 Atkyns, 282.

^g 3 P. Wms. 80.

^h 3 Atkyns, 726, 727.

clogging the permission with a condition which makes it nugatory. And though the rule was first adopted upon a reasonable ground, to prevent unnecessary delay, it may, if strictly observed, contradict the maxim, that a court of equity ought not for form sake to do a great injustice ¹.

Every demurrer must express the several causes of demurrer ^k; and likewise, in case the demurrer goes not to the whole bill, it must clearly express the particular parts of the bill demurred to ^l. If a demurrer is general to the whole bill, and there is any part, either as to the relief, or the discovery, to which the defendant ought to put in an answer, the demurrer, being entire, must be over-ruled ^m. But a defendant may put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes. For the same ground of demurrer frequently will not apply to different parts of a bill, though the whole is liable to demurrer. And in this case, one demurrer may be over-ruled upon argument, and another allowed ⁿ.

A demurrer being always upon matter apparent upon the face of the bill, and not upon any matter alleged by the defendant, it sometimes happens that a bill which, if all the parts of the case were disclosed would be open to a demurrer, is so artfully drawn as to avoid shewing upon the face of it

ⁱ 1 Vesey, 247.

^k Ord. in Ch. 97. Car.
Rep. 113.

^l 2 Vesey, 451.

^m 1 Vesey, 248.

ⁿ 3 P. Wms. 143.

any cause of demurrer. In this case the defendant is compelled to resort to a plea, by which he may allege matter which, if it appeared on the face of the bill, would be good cause of demurrer. For, in most cases, what is a good defence by way of plea, is also good as a demurrer, if the facts appear sufficiently by the bill °.

C H A P. IV.

Of Pleas.

A PLEA is a special answer to a bill, shewing, or relying upon, one or more things, as a cause why the suit should be either dismissed, delayed, or barred ^P. The defence proper for a plea must be such as reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit. The end of a plea is to save to the parties the expence of an examination of witnesses at large; and therefore it is not every good defence in equity that is good as a plea. For where the defence consists of a variety of circumstances there is no use of a plea; as the examination must still be at large, and the effect of

° See Hetley, 139. Bill v. 3 Atkyns, 226.
Sir Atwell Lake. But see ^P Prac. Reg. 273.

allowing

allowing a plea will be, that the court will give judgment on the circumstances of the case before they are made out by proof ¹.

Pleas are of three sorts; I. To the jurisdiction of the court. II. To the person of the plaintiff, or defendant. III. In bar of the plaintiff's suit.—Pleas to the jurisdiction of the court, and to the person of the plaintiff, generally go to the whole bill, and affect both the discovery sought, and the relief, if any, prayed by the bill. These may therefore be considered, without any reference to the peculiar kinds of bills to which they may be applied. But pleas in bar of the suit, though they frequently go to the whole bill, and affect both the relief and discovery, yet sometimes only affect part of both, and sometimes only one, and sometimes the other only, or part only of one, or of the other. It will be therefore necessary to consider pleas of this nature with a reference to the peculiar kinds of bills to which they relate.

I. If the court of chancery has not jurisdiction in the subject matter of the suit, the defendant may plead the matter which deprives the court of jurisdiction, and shew to what court the jurisdiction belongs ², and upon this ground may demand the judgment of the court, whether he shall be compelled to answer the bill ³. Pleas of this nature arise principally where the suit is for land within

¹ 1 Atkyns, 54. 1 Har.
Chan. Prac. 356 S. C.

² 1 Vesey, 203.

³ Chan. Prac. 417. 420.

a county palatine ^t, or where the defendant claims the privileges of an university ^u, or other particular jurisdiction.

The court of chancery being a superior court of general jurisdiction, nothing shall be intended to be out of its jurisdiction, which is not shewn to be so ^x. It is requisite, therefore, in a plea to the jurisdiction of the court, to allege that the court has not jurisdiction of the subject matter of the suit, and to shew by what means it is deprived of jurisdiction. It is likewise necessary to shew what court has jurisdiction ^y. If the plea does not properly set forth these particulars ^z, it is bad in point of form ^a. In point of substance it is necessary, to intitle the particular jurisdiction to exclusive cognizance of the suit, that it should be able to give complete remedy ^b. A plea, therefore, of privilege of the university of Oxford, to a bill for a specific performance of an agreement touching lands in Middlesex, has been over-ruled; for the university court could not give complete relief ^c.

^t Com. Dig. Chan. 56. Vent. 362.

Chan. Prac. 420. 1 Chan.

Ca. 41. Reported, upon view

of precedents, that the ju-

risdiction of the counties pa-

latine was allowed, between

parties dwelling within the

same, and for lands there,

and matters local. Nelf.

Rep. 37. 66.

^a Car. Rep. 65, 66. 73. 2

^x 1 Vesey, 204.

^y 1 Vern. 59. 1 Vesey, 203,
204.

^z See Nelf. Rep. 51.

^a 1 Vesey, 204. 2 Vent.
362.

^b 2 Ventris, 363. 1 Vern.
212.

^c 2 Ventris, 363.

And if a suit is instituted against different persons, some of whom have privilege, and some not, a plea will not hold ^d. It is the same case, where one defendant is not amenable to the particular jurisdiction ^e. If, likewise, there is a particular jurisdiction, and yet the parties to litigate any question are both resident within the jurisdiction of the court of chancery; as upon a bill concerning a mortgage of the island of Sarke, both mortgagor and mortgagee residing in England; the court of chancery will hold jurisdiction of the cause: for a court of equity *agit in personam* ^f. So where the court may not have jurisdiction to give relief, it may yet entertain a bill for a discovery, in aid of the court which can give relief, if the same discovery cannot be there obtained; as if the jurisdiction be in the king in council, where the defendant cannot be compelled to answer upon oath ^g.

Similar to a plea to the jurisdiction is the case of a plea to an information charging an undue election of a fellow of a college in one of the universities, that by the statutes the visitor of the college ought to determine all controversies concerning elections of fellows, and that such controversies ought not to be determined elsewhere ^h. But the extent of the visitor's authority must be averred;

^d Car. Rep. 55, 56. 22
Vin. Ab. 9.

^e 1 Vesey, 205.

^h 3 Atkyns, 662. 1 Vesey,

^c Hutton, 59.

71. 464.

^f 1 Vesey, 204. 4 Inst. 213.

and it must also be averred that he is able to do complete justice ⁱ. And where there is a trust created, the visitor having no power to compel performance of the trust, relief must be had in the king's courts of general jurisdiction ^k.

II. In respect of the person of the plaintiff it may be shewn, either that the plaintiff is by law disabled to sue, as being outlawed, or excommunicated, or a popish recusant convict, which work a temporary disability; or that the plaintiff is attainted in a præmunire, or of treason, or felony; or that he is an alien; or that he is incapable *alone* of instituting a suit. It may also be pleaded that the plaintiff, or defendant, is not such person as alleged in the bill; as feme sole, heir, executor, or administrator; and is not therefore to sue or be sued as such for the matter in question ^l. The three first of these pleas are generally to the person of the plaintiff suing in his own right; the three next may be to the person of the plaintiff suing in any right; and the last to the person either of the plaintiff, or defendant, in whatever right suing, or sued.

I. If outlawry is pleaded, the record, or the capias thereupon, must be pleaded *sub pede sigilli*, and is usually annexed to the plea ^m. A plea of outlawry, in a suit for the same duty or thing for which relief is sought by the bill, is insufficient, according

ⁱ 1 Vesey, 474.

^k 1 Vesey, 475.

^l Prac. Reg. 276.

^m Tothill, 54. Prac. Reg. 276.

to the rule of law, and shall be disallowed of course, as put in for delay. Otherwise a plea of outlawry is always a good plea, so long as the outlawry remains in force ⁿ. But a plea of this nature is no longer a bar than whilst the outlawry remains in force. If that is reversed, the plaintiff, upon payment of costs, may sue out fresh process against the defendant, and compel him to answer the bill ^o. Outlawry in a plaintiff, executor, or administrator, cannot be pleaded; for he sues *in auter droit* ^p. It is equally insufficient, if alleged in disability of a person named in a bill as the next friend of an infant plaintiff ^q, or in an information as a relator ^r.

2. The defendant may plead that the plaintiff is excommunicated, which must be certified by the ordinary, either by letters patent containing a positive affirmation that the plaintiff stands excommunicated, and for what; or by letters testimonial, reciting, "*quod scrutatis registeriis invenitur, &c.*" Either of these certificates must be *sub sigillo*, and so pleaded ^s. Excommunication is a good plea to an executor, or administrator, though they sue in *auter droit* ^t; but not to the next friend of an in-

ⁿ Ord. in Ch. 97. Ed. 1739.

^o Ord. in Ch. 97.

^p 1 Vern. 124. Prac. Reg. 277.

^q Prac. Reg. 278.

^r There is a case in Prec. in Ch. 13 where a plea of outlawry, in disability of the person of a relator, is said to

have been allowed in the duchy court of Lancaster. But the relator seems to have sustained the character of plaintiff, as well as of relator.

^s Prac. Reg. 278. Tothil, 54.

^t Co. Litt. 134. 4 Bac. Ab. 36.

fant ^u. This, like the plea of outlawry, ceases to be a bar when the disability is removed; and therefore the plaintiff, purchasing letters of absolution, may, as at law, sue out fresh process, and compel the defendant to answer the bill.

3. By statute 3 Ja. I. c. 5. ^f. 11. every popish recusant convict is in many cases disabled to sue, in the same manner as a person excommunicated. The instances of a plea of conviction of recusancy have probably been rare, as no traces of any occur in the books of reports, nor does the form of the plea appear in the books of practice. If advantage was attempted to be taken of this statute, the court would probably require the same averments to support the plea as are necessary to a plea of the same nature at law ^x. This plea also ceases to be a bar, if the plaintiff, by conforming, removes the disability.

4. A plea, that the plaintiff is disabled from suing, being attainted, is equally rare. It would probably be likewise judged with the same strictness as if it was a plea at law ^y.

5. There is little more to be found in the books upon the subject of a plea that the plaintiff is an alien ^z. An alien, who is not an alien enemy, is under no disability of suing for any personal demand ^a; and an alien enemy may sue under some

^u Prac. Reg. 278,

^x 3 Bac. Ab. 780, 781.

^y 2 Atkyns, 399.

Atkyns, 399. 2 Vin.

Ab. 274. Alien (I.) Prac.

Reg. 278.

^a 1 Atkyns, 51.

circumstances ^b. A plea has been put in to a bill filed by an alien infidel, not of the christian faith, and was attempted to be supported upon the ground, that the plaintiff was upon a cross bill incapable of being examined upon oath. The plea was overruled without argument ^c.

6. If a bill is filed in the name of any person incapable *alone* of instituting a suit; as an infant, a married woman, or an idiot or lunatic so found by inquisition; the defendant may plead the infancy, the coverture ^d, or the inquisition of idiocy or lunacy, in bar of the suit.

7. A plea, that the plaintiff is not such person as alleged in the bill, though a negative plea, is good in abatement of the suit; as where a plaintiff intitles himself as administrator, and the defendant pleads that he is not administrator ^e. So where a person intitling himself as administrator of an intestate files a bill, and the defendant pleads that the supposed intestate is still living. A plea, that the defendant is not such person as alleged in the bill, is also mentioned in the books of practice as a plea which may be supported ^f. It seems to have been considered as more convenient for a person, sued in a character which he does not sustain, to put in an answer, alleging the mistake in the bill, and praying the judgment of the court, whether he should be

^b 3 Burr. 1741. 1 Bac. Ab.

84. Alien (D.)

^c 1 Atkyns, 51.

^d Prac. Reg. 276.

^e 1 Vern. 473.

^f Prac. Reg. 276.

compelled farther to answer the bill ^g. But this in fact amounts to a plea.

III. A plea in bar is commonly where some foreign matter is alleged, whereby, supposing the bill, so far as it is not contradicted by the plea ^h, to be true, yet the suit, or some part thereof, is barred ⁱ. Where there are matters alleged in the bill to which the bar does not reach, or there is some circumstance relating to the matter in bar, and charged in the bill, which requires a particular answer, as suggestions of fraud, the defendant must, to such points, answer upon oath ^k. The answer, in this case, must be full to the charges in the bill, and sufficient to support the plea ^l. For the matters so charged will be intended against the pleader, unless they are fully denied by the answer.

Pleas in bar will be first considered with reference only to the first species of bills, and to bills of discovery merely; and will be afterwards treated of as applied to the several other species of bills. They may be ranked under the heads of, I. Pleas of matters recorded, or as of record, in the court itself, or some other court of equity; II. Pleas of matters *in pais*; and III. Pleas of matters of record, or matters in the nature of matters of record, in some court, not being a court of equity, either alone, or joined with matters *in pais*.

^g Car. Rep. 61. Prac. Reg. 278.

^h 2 Atkyns, 51.

ⁱ Prac. Reg. 279.

^k Prac. Reg. 280.

^l 3 Atkyns, 303, 304.

1. Pleas in bar of matters recorded, or as of record, in the court itself, or some other court of equity, may be, 1. a decree or order of the court, by which the rights of the parties are already determined ^m, or another bill for the same cause dismissed ⁿ; 2. another suit depending in the court, or in another court of equity, between the same parties, for the same cause ^o. Pleas of this nature generally go both to the discovery sought, and the relief prayed, by the bill.

1. A decree, determining the rights of the parties, and signed and inrolled, may be pleaded to a new bill for the same matter; and this even if the party bringing the new bill was an infant at the time of the former decree. For a decree inrolled can only be altered upon a bill of review ^p. But the decree must be in its nature final, or afterwards made so by order, or it will not be a bar. Therefore a decree, for an account of principal and interest due on a mortgage, and for a foreclosure in case of non-payment, cannot be pleaded to a bill to redeem, unless there is a final order of foreclosure ^q. Nor can a decree, unless cause by default, be pleaded, without the order to make the decree absolute. Upon a plea of this nature so much of the former bill and answer must be set forth, as is necessary to shew that the same point was then in issue ^r. A

^m 3 Atkyns, 626,

^q 2 Vesey, 450.

ⁿ 1 Vern. 310.

^r 2 Atkyns, 603. 2 Vesey,

^o 3 Atkyns, 587. 590.

577.

^p 3 Atkyns, 626.

decree,

decree, dismissing a former bill for the same matter, may be pleaded in bar ^s, if the dismissal was not, in terms, directed to be without prejudice ^t. The decree must be signed and inrolled, or it cannot be pleaded in bar of another suit ^u, though it may be insisted upon by way of answer ^x. But though it cannot be pleaded directly in bar of the suit for want of inrolment, it might, perhaps, be pleaded to shew, that the bill was exhibited contrary to the usual course of the court, and ought not therefore to be proceeded upon. For if the decree appeared upon the face of the bill, the defendant might demur ^y; a decree not signed and inrolled being to be altered only upon a re-hearing ^z, as a decree signed and inrolled can be altered only upon a bill of review ^a. An order of dismissal is a bar only where the court determined that the plaintiff had no title to the relief sought by his bill; and therefore an order dismissing a bill for want of prosecution is not a bar to another bill ^b.

2. A plea, of another suit depending in the same or another court of equity, for the same cause ^c, must aver that there have been proceedings in the suit; as appearance, or process requiring appearance

^s 1 Vern. 310. 1 Brown. ^z 2 Vesey, 598.
 Parl. Ca. 281. ^a 1 Ch. Ca. 44. 2 Freem.
^t 1 Chan. Ca. 155. 179.
^u 3 Atkyns, 809. ^b 1 Atkyns, 571.
^x 2 Vesey, 577. ^c Ord. in Ch. 98. Ed. 1739.
^y 3 Atkyns, 809, 810. Bun- 1 Ch. Ca. 241. 3 Atkyns,
 bury, 56. 2 Vesey, 571. 587. 590.

at the least ^d. It seems likewise regular to aver that the suit is still depending ^e; though, as a plea of this nature is not usually argued, but, being clearly a good plea, if true, is referred to the examination and enquiry of one of the masters of the court as to the fact ^f, it has been held, that a positive averment that the former suit is depending is not necessary ^g. For the same reason a plea of this kind is not put in upon oath ^h. It is not necessary to the sufficiency of a plea of this nature, that the former suit should be precisely between the same parties as the latter. For if a man institutes a suit, and afterwards sells part of the property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit depending touching the whole property will hold ⁱ. So where one part-owner of a ship filed a bill against the husband for an account, and afterwards the same part-owner, and the rest of the owners, filed a bill for the same purpose, the pendency of the first suit was held a good plea to the last ^k. For tho' the first bill was insufficient for want of parties, yet by the second bill the plaintiff was doubly vexed for the same cause. The course of the court in such a case seems to be, to dismiss the first bill, and to direct the defendant in the second cause to answer,

^d 1 Eq. Ca. Ab. 39.

^h 1 Vern. 332.

^e 3 Atkyns, 589.

ⁱ 1 Eq. Ca. Ab. 39.

^f Ord. in Ch. 98. Ed. 1739.

^k Durand v. Hutchinson,

^g 1 Vern. 332.

Mich. 1771.

upon

upon being paid the costs of the plea allowed ¹. Where a second bill is brought by the same person for the same purpose, but in a different right; as where the executor of an administrator brought a bill, conceiving himself to be the personal representative of the intestate, and afterwards procured administration *de bonis non*, and brought another bill ^m; the pendency of the former bill is not a good plea. The reason of this determination seems to have been, that the first bill being wholly irregular, the plaintiff could have no benefit from it, and it might have been dismissed upon demurrer. Where a decree is made upon a bill brought by a creditor, on behalf of himself and all other creditors of the same person, and another creditor comes in before the master to take the benefit of the decree, and proves his debt, and then files a bill on behalf of himself and the other creditors, the defendants may plead the pendency of the other suit; for a man coming in under a decree is *quasi* a party ⁿ. The proper way for a creditor in such a situation to proceed, if the plaintiff in the original suit is dilatory, is by application to the court for liberty to conduct the cause. If a plaintiff sues a defendant, at the same time, for the same cause, at common law and in equity, the defendant, after answer put in, must apply to the court that the plaintiff may make his election where he will proceed, and cannot plead

¹ 1 Chan. Ca. 241.

ⁿ 3 Atkyns, 557.

^m 2 Atkyns, 44.

the pendency of the suit at common law in bar of the suit in equity °, though the practice was formerly otherwise °.

II. Pleas in bar, of matters *in pais* only, sometimes go both to the discovery fought, and to the relief prayed, by the bill, or by some part of it; sometimes only to the discovery, or part of the discovery; and sometimes only to the relief, or part of the relief.

Pleas of this nature which may go both to the discovery and relief fought by the bill, or by some part thereof, but which sometimes extend no farther than the relief, are principally, 1. a want of title in the plaintiff; 2. a want of proper parties to the suit; 3. a stated account; 4. an award; 5. a release; 6. a will; 7. a purchase, mortgage, or settlement, for a valuable consideration, without notice of the plaintiff's claim.

1. A plea may be of want of title in the plaintiff, by reason of a disability either in him or in the person under whom he claims. As if a plaintiff claims as purchaser, and the defendant pleads that he was a papist, and incapable of taking by purchase °; or a plaintiff claims a real or personal estate accrued previous to conviction, either of himself or of the person under whom he claims, of some

° 3 P. Wms. 90.

° Ord. in Chan. 99. Ed. 1739.

° See, however, 18 Geo.

III c. 60. by which this incapacity is, under certain conditions, removed.

offence which occasioned a forfeiture ^r; or previous to a bankruptcy; or any other want of title ^s in the plaintiff to the matter claimed by the bill. A plea of conviction of any offence which occasions forfeiture, as manslaughter, must be pleaded with equal strictness as a plea of the same nature at common law ^t. Pleas of want of title in the plaintiff generally extend to the discovery sought by the bill, as well as to the relief prayed ^u.

2. If a want of proper parties is not apparent on the bill, a defendant may plead it ^x; and a plea of this nature goes both to the discovery and the relief. But where a sufficient reason is suggested by the bill for not making the necessary party; as where a personal representative is a necessary party, and the bill states that the representation is in contest in the ecclesiastical court ^y; or where a necessary party is resident abroad, out of the jurisdiction of the court ^z, and the bill charges that fact; or where the bill seeks a discovery of the necessary parties ^a; a plea for want of parties will not be allowed. A plea for want of parties to a bill for a discovery merely will not hold ^b; for the plaintiff in that case seeks no decree.

^r 2 Atkyns, 399.

^s Gilbert, 228

^t 2 Atkyns, 399.

^u Gilb. 229.

^x 1 Vern. 110. 2 Atkyns, 51.

^y 2 Atkyns, 51.

^z Prec. in Ch. 83. 2 Atkyns, 510.

^a 1 Vern. 95.

^b 2 Eq. Ca. Ab. 170.

3. A plea of a stated account is a good bar to a bill for an account ^c. It must shew that the account was in writing, and the balance in writing; or at least it must set forth the balance ^d. If the bill charges that the plaintiff has no counterpart of the account, the account should be annexed by way of schedule to the answer, that if there are any errors upon the face of it, the plaintiff may have an opportunity of pointing them out ^e. If error or fraud are charged, they must be denied by the plea, as well as by way of answer ^f; and if neither error nor fraud are charged, the defendant must by the plea aver that the stated account is just and true, to the best of his knowledge and belief ^g. The delivery up of vouchers at the time the account was stated seems to be a proper averment in a plea of this nature ^h, if the fact was such.

4. An award may be pleaded to a bill to set aside the award, and open the account ⁱ; and it is not only good to the merits of the case, but likewise to the discovery sought by the bill ^k. But if fraud, or partiality, are charged against the arbitrators, those charges must not only be denied by way of averment in the plea, but the plea must be supported by an answer shewing the arbitrators to have been incorrupt and impartial ^l.

^c 1 Vern. 180. 2 Atkyns, 1.

^d 2 Atkyns, 399.

^e 3 Atkyns, 303.

^f Gilb. on Ch 56.

^g 3 Atkyns, 70.

^h Gilb. on Ch 57.

ⁱ 2 Atkyns, 395. 501.

^k 3 Atkyns, 529. 644.

^l 2 Atkyns, 396. 501.

5. In a plea of a release ^m the defendant must set out the consideration upon which the release was made. If a release is pleaded to a bill for an account, it must be under seal; otherwise it must be pleaded as a stated account only ⁿ.

6. To a bill brought, upon some ground of equity, by an heir at law against a devisee, to turn the devisee out of possession, the devisee may plead the will, and that it was duly executed, and ought to prevail, until upon an issue at law it should be found to be otherwise ^o. But if the bill prays a receiver, and the plea goes to that part of the bill, it will be so far over-ruled; as it may be necessary for the court in the progress of the cause to appoint a receiver ^p.

7. A plea of purchase for a valuable consideration, or of a mortgage without notice of the plaintiff's title, is a bar to a suit in equity ^q. Such a plea must aver, that the person who conveyed, or mortgaged, to the defendant, was seised in fee, or pretended to be seised ^r, and was in possession ^s, if the conveyance purported an immediate transfer of the possession, at the time when he executed the pur-

^m 2 Vesey, 103. Hardres, 168.

ⁿ Gilb. on Ch. 57.

^o 3 Atkyns, 17. Anstis v. Dowling, cited 2 Vesey, 361. Meadows v. duchess of Kingston, Mich. 1777.

^p 3 Atkyns, 17. and Meadows v. duchess of Kingston. But see 2 Vesey, 362, 363.

^q 2 Atkyns, 397. 630. 2 Ventris, 361.

^r 3 P. Wins. 281.

^s 1 Vern. 246.

chafe or mortgage deed ^t. It must aver a conveyance, and not articles merely ^u; for if there are articles only, and the defendant is injured, he must sue at law upon the covenants in the articles ^x. It must aver the consideration, and the actual payment of it; for if it is only secured to be paid it is not sufficient ^y. The plea must also deny notice of the plaintiff's title, or claim ^z, previous to the execution of the deeds, and payment of the consideration ^a; and the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title ^b. If particular instances of notice or circumstances of fraud are charged, they must be denied as specially and particularly as charged in the bill ^c. This special and particular denial, of notice or fraud, must be by way of answer, that the plaintiff may be at liberty to except to its sufficiency ^d. But notice, and fraud, must also be denied, generally, by way of averment in the plea; otherwise the fact of notice, or of fraud, will not be in issue ^e. Notice, or fraud, thus put in issue, if

^t 3 P. Wms. 281.

^u 3 P. Wms. 281.

^x 1 Atkyns, 571.

^y 3 Atkyns, 304. 814.

^z 1 Vern. 179.

^a 1 Ch. Ca. 34. 2 Atkyns, 631. 3 Atkyns, 304.

^b 1 Atkyns, 522.

^c 3 Atkyns, 815. 2 Vesey, 450.

^d 1 Vern. 185.

^e 3 P. Wms. 95. Gilb. on Ch. 58. Contr. 3 P. Wms. 244. In the case of Meadows v. duchess of Kingston, Mich. 1777, the chancellor seemed to be of opinion, that notice, and fraud, were to be denied by way of averment in the plea, in cases only whereq

if proved, will effectually open the plea on the hearing of the cause. A purchaser with notice, of a purchaser without notice, may shelter himself under the first purchaser ^f. But notice to an agent is notice to the principal ^g; and where a person, having notice, purchased in the name of another who had no notice, and knew nothing of the purchase, but afterwards approved it, and without notice paid the purchase-money, and procured a conveyance; the person first contracting was considered from the beginning as the agent of the actual purchaser, who was therefore held affected with notice ^h. A settlement in consideration of marriage is equivalent to a purchase for a valuable consideration, and may be pleaded in the same manner ⁱ. If a settlement is made after marriage, in pursuance of an agreement before marriage, the agreement, as well as the settlement, must be shewn ^k. A widow, defendant to a suit brought by any person claiming under her husband, to discover what lands she is in possession of, and what is her title, may plead her settlement in bar to any discovery, unless the plaintiff offers ^l, and

where the denial made part of an equitable defence; as in a plea of purchase for valuable consideration, the denial of notice must be by way of averment in the plea, because the want of notice creates the equitable bar.

^f Prec. in Ch. 51. 1 At-

kyns, 571. 2 Atkyns, 139. 242.

^g 2 Vern. 574.

^h 1 Brown. Parl. Ca. 244.

2 Brown. Parl. Ca. 596.

ⁱ Rep. Temp. Finch. 9.

^k 1 Vern. 139.

^l 2 Vesey, 450.

is able, to confirm her jointure. But a plea of this nature must set forth the settlement, and the lands comprized in it, with sufficient certainty ^m. A plea of purchase for a valuable consideration protects a defendant from giving any answer to a title set up by the plaintiff; but a plea of bare title only, without setting forth any consideration, is not sufficient for that purpose ⁿ. Upon a plea of purchase for a valuable consideration, to a discovery of deeds and writings, the purchase deed must be excepted; for it is pleaded ^o.

Upon a similar ground, if a bill is filed for discovery of goods purchased of a bankrupt, the defendant may plead that he purchased them *bona fide*, for a valuable consideration, paid before the commission of bankrupt was sued out, and before he had any notice of the bankruptcy ^p.

Pleas in bar, of matters *in pais* only, which extend no farther than the discovery sought by the bill, or by some part thereof, may be, 1. that the discovery may subject the defendant to pains and penalties; 2. that it may subject him to a forfeiture, or something in the nature of a forfeiture; 3. that it would betray the confidence reposed in a counsel, attorney, or arbitrator. And any other matter, which may shew that the defendant ought not to

^m 1 Atkyns, 52.

ⁿ 2 Atkyns, 241.

^o 2 Vesey, 107.

^p 2 Chan. Ca. 72, 73. 1 Vern. 27.

be compelled to make the discovery sought, for similar reasons, may be pleaded in like manner.

1. It has been already observed, that no person is bound to answer so as to subject himself to punishment, in whatever manner that punishment arises, or whatever is the nature of the punishment ⁹. If, therefore, a bill requires an answer which may subject the defendant to any pains or penalties, or tend to accuse him of any crime, and this is not so apparent upon the face of the bill that the defendant can demur, he may by plea set forth by what means he may be liable to punishment, and insist he is not bound to answer the bill, or so much thereof as the plea will cover ¹. Thus if a bill is brought for discovery of a marriage, where the fact, if true, may subject the party to punishment in the ecclesiastical court for incest, the defendant may plead the matters to shew that the marriage, if real, was incestuous, and would subject the parties to pains and penalties ². But if the discovery sought is not of a fact which can subject the defendant to any penalty, though connected with some other fact which may; as where a question is, whether the defendant has a legitimate son; the defendant is bound to answer. For the discovery of that fact cannot subject him to a penalty, though the discovery of his marriage

⁹ Pag. 64. See 2 Vesey, 245. 1 Vern. 109.

¹ 1 Vern. 110.

² 2 Vesey, 243.

with the mother of the son may; and therefore he shall not be compelled to discover the marriage ^t.

2. It has been also already ^u observed, that no person is bound to answer so as to subject himself to any forfeiture, or to any thing in the nature of a forfeiture ^x. If this is not apparent on the bill, the defence must be made by way of plea. But such a plea will only bar the discovery of the fact which would occasion a forfeiture. Therefore, where a tenant for life pleaded, to a bill for discovery whether he was tenant for life or not, that he had made a lease for the life of another, which, if he was tenant for his own life only, might occasion a forfeiture, the plea was over-ruled ^y. So upon a bill charging the defendant to be tenant for life, and that he had committed waste, he may plead to the discovery of the act which would occasion the forfeiture, the waste; but he cannot plead to the discovery whether he was tenant for life, or not ^z. So upon a bill to discover whether the defendant was an alien, and whether her child was an alien, and where born, it was held the defendant was not bound to discover whether she was herself an alien, but she was compelled to discover whether her child was an alien, and where born ^a. In all cases of forfeiture, if the plaintiff is intitled alone to the benefit of the forfeiture ^b, and waives it by his bill, the de-

^t 2 Vesey, 493.

^u Pag. 66.

^x 1 Atkyns, 526.

^y 2 Vesey, 108.

^z 2 Vesey, 109.

^a 2 Vesey, 494.

^b Mosely, 75.

defendant will be compelled to make the discovery required. And though the plaintiff is not intitled to the benefit of the forfeiture, yet if the defendant has by his own agreement bound himself not to insist on being protected from making the discovery, the court will compel him to make it ^c.

3. If a bill seeks a discovery of a fact from one whose knowledge of the fact was derived from the confidence reposed in him as a counsel, an attorney, or an arbitrator, he may plead, in bar of the discovery, that his knowledge of the fact was so obtained ^d.

III. Pleas in bar, of matters of record, or of matters in the nature of matters of record, in some court not being a court of equity, either alone, or joined with matters *in pais*, likewise extend sometimes both to the discovery, and the relief, sought by the bill, or by some part thereof; sometimes only to the discovery, or part of the discovery; and sometimes only to the relief, or part of the relief.

Pleas of this nature may be, 1. a fine, and non-claim: 2. a recovery, and the deed to lead, or declare, the uses thereof: 3. a judgment at law, or sentence of some other court: 4. some statute; as the statute of frauds, and perjuries; the statute of limitations; or any other statute which is a bar to the demands of the plaintiff.

^c Mosely, 77, and the ^d 1 Ch. Ca. 277.
cases there cited.

1. A plea of a fine and non-claim, though a legal bar, yet is equally good in equity ^e, provided it is pleaded with proper averments ^f. Where a title is merely legal, though the defect is apparent upon the face of the deeds, yet the fine will be a bar in equity, and a purchaser will not be affected with notice so as to make him a trustee for the person who had the right. For a defect upon the face of title deeds is often the occasion of a fine being levied ^g. And even a fine levied upon bare possession, with non-claim, may be a bar in equity, if a legal bar, though with notice at the time the fine was levied ^h. But with respect to equitable titles there is a distinction. For where the equity charges the lands only, the fine bars. But where it charges the person only, in respect of the land, it does not bar ⁱ. Therefore if a man purchases from a trustee, and levies a fine, he stands in the place of the feller, and is as much a trustee as the feller was ^k; provided he has notice of the trust, or is a purchaser without consideration ^l. So if the grantee of a mortgagee levies a fine, that will not discharge the equity of redemption ^m. But there are cases, both of legal and equitable titles, in which a fine and non-claim will bar,

^e W. Jones, 416. 1 Ch. Ca. 278.

^f 2 Atkyns, 631. 3 Atkyns, 303.

^g 2 Atkyns, 631.

^h 2 Atkyns, 240.

ⁱ 1 Ch. Ca. 278. 2 Atkyns, 390.

^k 2 Atkyns, 631.

^l Gilb. on Ch. 62.

^m 2 Atkyns, 631. Contr. 2 Freem. 21. 69.

notwith-

notwithstanding notice at the time of levying the fine ⁿ. If a fine is levied where the legal estate is in trustees for an infant, and the trustees neglect to claim, the infant, claiming by bill within five years after he attains twenty-one, shall not be barred ^o. But, perhaps, this should be understood as referring to the case of a fine levied with notice of the title of the infant^p. Where a title to lands is merely equitable, as in the case of an agreement to settle lands to particular uses, claim to avoid the fine must be by *subpœna* ^q. The pendency of a suit in equity will, therefore, in equity, prevent the running of a fine ^r. Upon the whole, wherever a person comes in by a title opposite to the title to a trust estate; or comes in under the title to the trust estate, for a valuable consideration, without fraud, or notice of fraud, or of the trust; a fine and non-claim may be set up as a bar to a claim of a trust ^s. When a fine and non-claim are set up as a bar to a claim of a trust, by a person claiming under the same title, it is not sufficient to aver, that, at the time the fine was levied, the seller of the estate, being seised, or pretending to be seised, conveyed; but it is necessary to aver, that the seller was actually seised. It is not, indeed, requisite to aver, that the seller was seised in fee; an averment that he

ⁿ 2 Atkyns, 631. 3 Atkyns, 303. 560.

^o 2 Vern. 368.

^p 3 P. Wms. 309. 310.

^q 1 Ch. Ca. 278. 2 Freem. 21.

^r 2 Atkyns, 389. 90.

^s Gilb. on Ch. 63.

was seised *ut de libero tenemento*, and being so seised, a fine was levied, will be sufficient ^s. A fine and non-claim may be pleaded in bar to a bill of review ^t.

2. To a claim under an entail, a recovery duly suffered, with the deed to lead the uses of that recovery, may be pleaded; if the estate limited to the plaintiff, or under which he claims, is thereby destroyed.

3. To a bill to set aside a judgment, as obtained against conscience, the defendant may plead the verdict, and judgment, in bar ^u. But if there is any charge of fraud, or any circumstance shewn as a ground for relief, the judgment cannot be pleaded; unless the fraud, or other circumstance, the ground upon which the judgment is sought to be impeached, be denied, and thus put in issue by the plea. A sentence in a foreign court may be a proper defence by way of plea; but the court pronouncing the sentence must at least have full jurisdiction to determine the rights of the parties ^x. Upon the same ground, plea of a will and probate in the proper ecclesiastical court, is a good plea to a bill by persons claiming as next of kin of a person supposed to have died intestate ^y. Even if fraud in obtaining the will is charged, that is not a sufficient equitable ground to impeach the probate; for the parties may resort to the ecclesiastical court, which

^s 2 Atkyns, 630.

^t 2 Vern. 190.

^u 3 Atkyns, 223.

^x 3 Atkyns, 215.

^y 1 Vern. 397.

is competent to determine of the fraud ^z. But where the fraud practised has not gone to the whole will, but only to some particular clause; or if the fraud has been practised to obtain the consent of the next of kin to the probate; the courts of equity have laid hold of these circumstances to declare the executor a trustee for the next of kin ^a. Where there are no such circumstances, the probate of the will is a clear bar to a demand of personal estate; and if the testator died in a foreign country, and left no goods in any other country, probate of the will according to the law of that country is sufficient ^b.

4. To a bill for discovery of a trust, the statute of frauds and perjuries ^c, with an averment that there was no declaration of trust in writing, may be pleaded ^d. The same statute, with an averment that a will was not duly executed as required by the statute, is a good plea to a bill brought by a devisee, claiming under the will. To a bill for a specific performance of an agreement, the same statute, with an averment that there was no agreement in writing, signed by the parties, may be pleaded ^e. But in all these cases, if any matter is charged by the bill which may avoid the bar created

^z 2 Vern. 8. 76. 2 Ch. 203. 1 Vesey, 284.

Ca. 178. 1 P. Wms. 389.

² P. Wms. 286. Meadows

v. duchess of Kingston, Michaelmas 1777.

^a 1 Strange, 666. Gilb.

^b 1 Vern. 397.

^c 29 Car. II. c. 3.

^d 2 Atkyns, 156.

^e Prec. in Ch. 402. 533.

by the statute, that matter must be denied, generally, by way of averment in the plea; and it must be denied, particularly, and precisely, by way of answer to support the plea. The statute of limitations ^f is likewise a good plea ^g. But if a bill charges a fraud, and that the fraud was not discovered till within six years before filing the bill, the statute is not a good plea, unless the defendant denies the fraud, or avers that the fraud, if any, was discovered six years before filing the bill ^h. And though the statute of limitations is a bar to the claim of a debt, it is not to a discovery when the debt became due; for if that is set forth, it will appear to the court whether the time limited by the statute is elapsed ⁱ. Where a particular special promise is charged to avoid the operation of the statute, the plaintiff must deny the promise charged by averment in the plea ^k, as well as by answer to support the plea. Where the demand is of any thing executory, as a note for payment of an annuity, or of money at a distant period, or by instalments, the defendant must aver that the cause of action hath not accrued within six years; because the statute bars only as to what was actually due six years before the action brought ^l. Upon a bill for discovery of a title, charging fraud, and praying

^f 21 Ja. I. c. 16.

^g 3 P. Wms. 309. 2 Atkyns, 395. Gilb. on Ch. 61.

^h 3 P. Wms. 143.

ⁱ 2 Atkyns, 51.

^k 3 Atkyns, 70.

^l 3 Atkyns, 71.

possession,

possession, the statute of limitations alone is not a good plea to the discovery; for the defendant must answer to the charge of fraud ^m. The statute of limitations may be pleaded to a bill to redeem a mortgage, if the mortgagee has been in possession twenty years ⁿ; and indeed a demurrer has been allowed in this case, where the possession has appeared upon the face of the bill ^o, though later cases seem to be to the contrary ^p. To a bill, on an equitable title to presentation to a living, seeking to compel the defendant to resign, plenary for six months before the bill was filed may be pleaded in bar; the statute of Westminster 2 ^q being considered for this purpose as a statute of limitation, in bar of an equitable, as well as of a legal, right ^r. But if a *quare impedit* is brought before the six months are expired, though the bill is filed after, it may be in some cases a ground for the court to interfere ^s, and consequently the plenary would not in such cases be pleadable in bar.

In the same manner, any other statute, which may be a bar to the demands of the plaintiff, may be pleaded, with the averments necessary to bring the case of the defendant within the statute, and to avoid any equity which may be set up against the bar created by the statute. And if a discovery

^m 3 Atkyns, 558.

ⁿ 3 Atkyns, 225.

^o 3 P. Wms. 287. Note B.

^p 3 Atkyns, 225, 226, and the authorities there cited.

^q 13 Edw. I. c. 5.

^r 2 P. Wms. 404. 3 At-

kyns, 459.

^s 2 P. Wms. 405.

is sought which may subject the defendant to the penalties of any statute, he may plead that statute in bar of the discovery. Thus where a bill sought a discovery, whether the defendant had become a purchaser of an estate, of which the supposed seller was not in possession, the defendant pleaded the statute of 32 Hen. VIII. c. 9. against selling, or contracting to sell, any pretended rights or titles ^t. So where a bill was brought by insurers, for a discovery of what goods had been shipped on board a vessel, the defendant pleaded the statutes which make it penal to export wool. He was however directed to answer so far as to discover what goods were on board the vessel besides wool ^u. In the same manner, statutes which occasion forfeitures, or any thing in the nature of a forfeiture, may be pleaded. Thus to a bill, seeking a discovery, whether a person under whom the defendant claimed, was a papist, the defendant pleaded his title, and the statute of 11 and 12 Will. III. disabling papists ^x.

Pleas in bar have been hitherto considered with reference only to the two kinds of bills most common in practice. The same grounds of plea will likewise hold in many cases to the several other kinds of bills, according to their respective natures, except to a certiorari bill ^y. But some of

^t 3 P. Wms. 375.

^u 1 Atkyns, 53.

^x 1 Atkyns, 526. 528. 2 Vesey, 389.

^y See, however, 3 Chan.

Rep. 66. where a plea, to a certiorari bill, of a decree in the inferior court, is mentioned.

the other kinds of bills admit of a peculiar defence by way of plea.

Thus, to a bill of interpleader, if the plaintiff, or either of the defendants, has no right, both of the defendants in the first case, and the defendant having right in the second, may plead the matter necessary to shew that the plaintiff, or the other defendant, has no right; and, consequently, either that there is no subject of interpleader, or that the plaintiff has no right to compel the defendants to interplead.

To a bill to perpetuate the testimony of witnesses, the defendant may plead any thing which shews that the plaintiff has no interest in the matter to which he prays liberty to examine, or that the defendant has an equal title to the protection of a court of equity. As if a bill is brought to perpetuate the testimony of witnesses to a will, and the defendant pleads a subsequent will, or that he is a purchaser for a valuable consideration without notice of the will ²; or that the matter, to which the plaintiff prays leave to examine his witnesses, is capable of being immediately tried at law, and that the plaintiff has not established his right at law ^a.

If a bill of revivor is brought, without sufficient cause to revive the suit against the defendant, and this is not apparent on the bill, the defendant may plead the matter necessary to shew that the plaintiff

² 1 Vern. 354.

^a 1 Vern. 303. 312.

is not intitled to revive the suit against him ^b. Or if the plaintiff is not intitled to revive the suit at all, though a title is stated in the bill, so that the defendant cannot demur, the objection to the plaintiff's title may also be taken by way of plea. If a supplemental bill is brought upon matter which arose before the original bill was filed, and this is not apparent on the bill, the defendant may plead that fact. Bills in the nature of bills of revivor and supplement are liable to the same pleas.

A cross bill differing in nothing from the first species of bills, with respect to which pleas in bar have in general been considered, except that it is always occasioned by a former bill, it is not liable to any plea which will not hold to the first species of bills. And a cross bill is not liable to some pleas which will hold to the first species of bills; as pleas to the jurisdiction of the court, and pleas to the person of the plaintiff, the sufficiency of which seem both affirmed by the original bill; unless the cross bill is exhibited in the name of some person alone, who is alone incapable of instituting a suit, as an infant, a feme covert, an idiot, or a lunatic.

It has been already mentioned ^c, that a part of the constant defence to a bill of review, for error apparent on a decree, is by a plea of the decree ^d. Where any matter beyond the decree, as length of time, a purchase for a valuable consideration, or

^b 3 P. Wms. 348.

^c Pag 73.

^d 1 Vern. 392. Nelson's Rep. 53.

any other matter, is to be offered against opening of the inrolment, that matter must also be pleaded ^e. A bill of review, upon the discovery of new matter, seems liable to any plea which would have avoided the effect of that matter, if charged in the original bill. Supplemental bills in the nature of bills of review seem to be in the same situation; and if the matter alleged to have been discovered since the decree, came to the plaintiff's knowledge before the decree, the defendant to the bill may plead this fact in bar ^f. If a decree is sought to be impeached on the ground of fraud, the proper defence seems to be a plea of the decree, accompanied by a denial of the fraud charged ^g.

If a plaintiff, filing a bill to carry a decree into execution, has no right to the benefit of the decree, the defendant may plead the fact, if it is not so apparent on the bill as to admit of a demurrer.

A bill, filed by the direction of the court, for the purpose of obtaining its decree touching some matter not in issue by a former bill, is not likely to be exposed to a defence by plea, as it is generally considered by the court before it is directed to be brought. But in its nature it is open to almost every plea already mentioned, except, perhaps, pleas to the jurisdiction of the court, and to the person of the plaintiff. Indeed if the bill is mistakenly brought

^e 2 Vesey, 109.

^g 1 Brown, Parl. Ca. 414.

^f 2 Atkyns, 40.

in the name of a person alone, who is alone incapable of instituting a suit, a plea to the person of the plaintiff will hold.

Having thus considered some of the principal grounds upon which pleas may be supported, it may be proper to observe some particulars which are necessary to be attended to in framing pleas in general.

In pleading there must be the same strictness in equity as at law ^h; at least in matter of substance. A plea in bar must follow the bill, and not evade it, or mistake the subject of it ⁱ. It must be *ad idem* ^k. A plea may be bad in part, and not in the whole ^l. This, however, must be understood with exceptions ^m. If a plea does not go to the whole bill, it must express to what part of the bill the defendant pleads; and therefore a plea, to such parts of the bill as are not answered, must be over-ruled, as too general ⁿ. So if the parts of the bill, to which the plea extends, are not clearly and precisely expressed; as if a plea is general, with an exception of matters after mentioned, and is accompanied by an answer; the plea is bad. For the court cannot judge what the plea covers, without looking into the answer, and determining whether it is sufficient or not, before the validity of the plea can be considered ^o.

^h 2 Atkyns, 632.

ⁱ Bunb. 70.

^k 2 Atkyns, 603.

^l 1 Atkyns, 53.

^m 1 Vesey, 205.

ⁿ 3 Atkyns, 70. Mose-

ly, 40.

^o 2 Vesey, 108.

A plea

A plea must aver facts to which the plaintiff may reply, and not, in the nature of a demurrer, rest on facts in the bill ^p. This, however, is not a very strict rule; and where a matter, though ground of demurrer, is negative; as the want of the usual affidavit to a bill for discovery of deeds, and for relief; it may, though perhaps not regularly, be pleaded. The averments in a plea ought, in general, to be positive. But in some cases a defendant has been permitted to aver according to the best of his knowledge and belief; as that an account is just and true ^r. And in all cases of negative averments, and of averments of facts not within the immediate knowledge of the defendant, it may seem improper to require a positive assertion. But unless the averment is positive, the matter in issue appears to be, not the fact itself, but the defendant's belief of it. And the conscience of the defendant is saved by the nature of the oath administered; which is, that so much of the plea as relates to his own acts is true, and that so much as relates to the acts of others he believes to be true. All the facts necessary to render the plea a complete equitable bar to the case made by the bill, so far as the plea extends, that the plaintiff may take issue upon it ^s, must be clearly and distinctly averred. Averments are likewise necessary, to exclude intendments which would otherwise be made against the pleader; and the

^p 3 Atkyns, 558.

^s Gilb. on Ch 58.

^r 3 Atkyns, 70. Tothill, 70.

averments must be sufficient to support the plea ^t. If there is any charge in the bill, which is an equitable circumstance in favour of the plaintiff's case against the matter pleaded; as fraud, or notice of title; that charge must be denied by way of answer, as well as by averment in the plea. In this case the answer must be full and clear, or it will not be effectual to support the plea ^u; for the court will intend the matters so charged against the pleader, unless they are fully and clearly denied ^x. Though the court, upon argument of the plea, may hold these charges sufficiently denied by the answer to exclude intendments against the pleader, yet if the plaintiff thinks the answer to any of them is evasive, he may except to the sufficiency of the answer in those points. A defendant may also support his plea by an answer touching any thing not charged by the bill, as notice of a title, or fraud. For by such an answer nothing is put in issue covered by the plea from being put in issue ^y, and the answer can only be used to support, or disprove, the plea. But if a plea is coupled with an answer to any part of the bill covered by the plea, and which consequently the defendant by the plea declines to answer, the plea will upon argument be over-ruled ^z.

If the plaintiff conceives a plea to be defective in point of form, or substance, he may take the judgment of the court upon its sufficiency. And if the

^t 2 Vesey, 245.

185.

^u 3 Atkyns, 304, 815. 3
P. Wms. 145. 3 Brown, Parl.
Ca. 373, 374.

^y Gilb. on Ch. 58, 59.

^z 2 Atkyns, 155. Gilb.
on Ch. 58.

^x 2 Atkyns, 241. Gilb.

plea is allowed upon argument; or the plaintiff, without argument, thinks it, though good in form and substance, not true in point of fact; he may take issue upon it, and proceed to disprove the facts upon which it is endeavoured to be supported ^a. For if the plea is, upon argument, held to be good in law; or the plaintiff admits it to be so by replying to it; the truth of the plea is the only subject of question remaining, so far as the plea extends; and nothing but the matters contained in the plea, as to so much of the bill as the plea covers, is in issue between the parties ^b. If, therefore, issue is thus taken upon the plea, the defendant must prove the facts it suggests. If he fails in this proof, so that at the hearing of the cause the plea is held to be no bar, the plaintiff is not to lose the benefit of the discovery sought by the bill, but the court will order the defendant to be examined on interrogatories, to supply the defect ^c. But if the defendant proves the truth of the matter pleaded, the suit, so far as the plea extends, is barred; even though the plea is not good, either in point of form or substance. Therefore if a defendant pleads a purchase for a valuable consideration, and omits to deny notice, and the plaintiff replies; the plea, though irregular, is admitted to be good, and the fact of notice not being in issue, the defendant, proving what he has pleaded, is intitled to have the bill dismissed ^d.

^a Prac. Reg. 283.

^c Nelf. Rep. 119.

^b 3 P. Wms. 95. Prec.
in Ch. 58. 1 Ch. Rep. 174.

^d 3 P. Wms. 94, 95.

If a plea requires an answer to support it, upon argument of the plea the answer may be read to counterprove the plea; and if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be over-ruled, or ordered to stand for an answer only^c. A plea is usually ordered to stand for an answer, where it states matter which may be a defence to the bill, though perhaps not proper for a plea, or informally pleaded. But if a plea states nothing which can be a defence, it is merely over-ruled. If a plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers^f; unless by the order liberty is given to except^g. But that liberty may be qualified, so as to protect the defendant from any particular discovery which he ought not to be compelled to make^h. And if a plea is accompanied by an answer, and is ordered to stand for an answer, without liberty to except, the plaintiff may yet except to the answer, as insufficient to the parts of the bill not covered by the pleaⁱ. If a plea, accompanied by an answer, is allowed, the answer may be read, at the hearing of the cause, to counterprove the plea^k.

There are some pleas which are not usually argued^l; but, being clearly bars, if true, either they are pleaded with such circumstances that their

^c 3 Atkyns, 304.

^f Moseley, 74.

^g 3 Atkyns, 815. 3 P.
Wms 239.

^h 2 Atkyns, 241.

ⁱ Moseley, 74.

^k 3 Atkyns, 303.

^l Ord. in Ch 98. Ed. 1739.

truth cannot be disputed, or, being mere matter of fact, they are referred to one of the masters of the court to inquire into the truth of the fact. Such are pleas of outlawry, or excommunication, which are always pleaded *sub sigillo*. Pleas of a former decree ^m, or of another suit depending ⁿ, are generally in the same predicament, being referred to a master to inquire into the fact. If, in any of these cases, the master reports the fact true, the bill stands instantly dismissed, unless the court otherwise orders ^o. But the plaintiff may except to the master's report, and bring on the matter to be argued before the court ^p. And if the plaintiff conceives the plea to be defective, in point of form, or otherwise, independent of the mere truth of the fact pleaded, he may set down the plea to be argued as in the case of pleas in general ^q.

Pleas to the jurisdiction of the court, or in disability of the person of the plaintiff, or defendant ^r; or pleas in bar of any matter of record, or of matters recorded, or as of record in the court itself ^s, or any other court; need not be upon oath. But pleas in bar, of matters *in pais*, must be upon oath ^t.

^m 1 Atkyns, 53, 54.

ⁿ Ord. in Ch. 93. Ed. 1739.

^o See 1 Ch. Ca. 241.

^p Durand v. Hutchinson,
Mich. 1771. on Exceptions.

^q Ord. in Ch. 98. Ed. 1739.

³ Atkyns, 587. 1 Vem. 332.

^r Ord. in Ch. 96.

^s Prac. Reg. 174.

^t Ibid.

C H A P. V.

Of Answers, and Disclaimers; of Exceptions to Answers; and of Demurrers, Pleas, Answers, and Disclaimers, or any two, or more of them, jointly.

IF a plea is over-ruled, the defendant may insist on the same matter by way of answer ^u. And whatever part of a bill is not covered by demurrer, or plea, must be defended by answer, unless the defendant disclaims. It has been already ^x mentioned, that every plaintiff is intitled to a discovery from the defendant of the matters charged in the bill, provided they are necessary to ascertain facts material to the merits of his case, and to enable him to obtain a decree. The plaintiff may require this discovery, either because he cannot prove the facts, or in aid of proof, and to avoid expence ^y. He is also intitled to a discovery of matters necessary to substantiate the proceedings, and make them regular and effectual in a court of equity ^z. However, if the discovery sought by a bill is matter of scandal, or will subject the defendant to any pain, penalty, or forfeiture, he is not bound to make it;

^u 3 P. Wms. 95. 2 Vesey, 492. 1 Atkyns, 450. ^y 2 Atkyns, 241. ^z 2 Vesey, 492.

^x Pag. 44.

and if he does not think proper to defend himself from the discovery by demurrer, or plea, according to the circumstances of the case, he may by answer insist that he is not obliged to make the discovery ^a. In this case the plaintiff may except to the defendant's answer as insufficient; and upon that exception it will be determined whether the defendant is or is not obliged to make the discovery. If the defence which can be made to a bill consists of a variety of circumstances, so that it is not proper to be offered by way of plea ^b; or if it is doubtful whether as a plea it will hold; the defendant may set forth the whole by way of answer, and pray the same benefit of so much as goes in bar, as if it had been pleaded to the bill ^c. Or if the defendant can offer a matter of plea which would be a complete bar, but has no occasion to protect himself from any discovery sought by the bill, and can offer circumstances which he conceives to be favourable to his case, and which he could not offer together with a plea, he may set forth the whole matter in the same manner. Thus if a purchaser for a valuable consideration, clear of all charges of fraud, or notice, can offer additional circumstances in his favour which he cannot set forth by way of plea, or of answer to support a plea; as the expending a considerable sum of money in improvements, with the knowledge of the plaintiff; it may be more pru-

^a 3 P. Wms. 238. 2 Vesey, 491.

^b 1 Atkyns, 54.

^c 2 P. Wms. 145.

dent to set forth the whole by way of answer, than to rely on the single defence by way of plea. To so much of the bill as it is necessary and material for the defendant to answer, he must speak directly, and without evasion; and must not merely answer the several charges literally, but he must confess, or traverse, the substance of each charge ^d. And wherever there are particular and precise charges, they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges.

Although the defendant by his answer denies the title of the plaintiff, yet in many cases he must make a discovery prayed by the bill, though not material to the plaintiff's title, and though the plaintiff, if he has no title, can have no benefit from the discovery. As if a bill is filed for tythes, praying a discovery of the quantity of land in the defendant's possession, and of the value of the tythes; though the defendant insists upon a modus, or upon an exemption from payment of tythes, or absolutely denies the plaintiff's title ^e, he must yet answer to the quantity of land, and value of the tythes ^f. Or if a bill is filed against an executor, by a creditor of the testator, the executor must admit assets, or set forth an account, though he denies the debt ^g.

^d Rules and Ord. in Ch.
99, 100. Ed. 1739.

^e Hardr. 130.

^g Hardr. 188.

^c See, however, Gilb. 229.

If an answer goes out of the bill, to state some matter not material to the defendant's case, it will be deemed impertinent, and the matter, upon application to the court, will be expunged. So in an answer, as in a bill, if any thing scandalous is inserted, the scandal will be expunged by order of the court. But, as in a bill, nothing relevant can be scandalous ^b.

It is the universal practice to add, by way of conclusion to an answer, a general traverse, or denial, of all the matters in the bill. This is said ⁱ to have obtained formerly, when the practice was, for the defendant merely to set forth his case by the answer, without answering every clause in the bill. But though, perhaps, rather impertinent if the bill is otherwise fully answered, and it has been determined to be in that case unnecessary ^k, yet it is still continued in practice.

If a plaintiff conceives an answer to be insufficient to the charges contained in the bill, he may take exceptions to it, stating such parts of the bill as he conceives are not answered, and praying that the defendant may in such respects put in a full answer to the bill. If the defendant conceives his answer to be sufficient, or for any other reason does not submit to answer the matters contained in the exceptions, one of the masters of the court is directed to look into the bill, the answer, and the

^b Mosely, 45. 70.

^k 2 Wms. 87.

ⁱ 2 P. Wms. 87.

exceptions,

exceptions, and certify whether the answer is sufficient in the points excepted to, or not. If the master reports the answer insufficient in any of the points excepted to, the defendant must answer again to those parts of the bill in which the master conceives the answer insufficient; unless, by excepting to the master's report, he brings the matter before the court, and there obtains a different judgement. But if the defendant has insisted on any matter as a reason for not answering, though he does not except to the master's report, yet he is not absolutely precluded from insisting on the same matter in a second answer ¹, and taking the opinion of the court whether he ought to be compelled to answer farther to that point, or not.

Where a defendant pleads, or demurs, and answers likewise, if the plaintiff takes exceptions to the answer, before the plea, or demurrer, has been argued, he admits the plea, or demurrer, to be good; for unless he admits them to be good, it is impossible to determine whether the answer is sufficient, or not. Indeed if the plea or demurrer is only to the relief prayed by the bill, and not to any part of the discovery, it has been held that the plaintiff may take exceptions to the answer before the plea is argued ^m. If a plea, or demurrer, is accompanied by an answer to any part of the bill, even a denial of

¹ 2 Vesey, 491.

S. See, however, 2 Atkins,

^m 3 P. Wms. 327. Note 390.

combination merely, and the plea or demurrer is over-ruled, the plaintiff must except to the answer as insufficient. But if a plea, or demurrer, is filed without any answer, and is over-ruled, the plaintiff need not take exceptions, and the defendant must answer the whole bill, as if no defence had been made to it ⁿ.

A further answer is in every respect similar to, and indeed is considered as forming part of, the first answer. So is an answer to an amended bill considered as part of the answer to the original bill. Therefore if the defendant, in a farther answer, or an answer to an amended bill, repeats any thing contained in a former answer, the repetition, unless it varies the defence in point of substance, will be considered as impertinent ⁿ. If, upon reference to a master, such parts of the answer are reported to be impertinent, they will be struck out as such, with costs, which in strictness are to be paid by the counsel who signed the answer.

If the defendant disclaims all right, or title, to the matter in demand by the plaintiff's bill, the court will, in general, consider the cause as instituted for vexation only, and dismiss the bill with costs. But if the plaintiff shews a probable cause for exhibiting a bill, he may pray a decree against the defendant, upon the ground of the disclaimer ^q.

ⁿ Bunbury, 123.

^o 3 Atkyns, 303.

^p 3 Atkyns, 303.

^q Prac. Reg. 41.

Where

Where the defendant disclaims, the plaintiff is not to reply^r.

A defendant may demur to one part of a bill, plead to another, answer to another, and disclaim as to another. But all these defences must clearly refer to separate and distinct parts of the bill. For the defendant cannot plead to that part to which he has already demurred, neither can he answer to any part to which he has either demurred, or pleaded^s; the demurrer demanding the judgement of the court whether he shall make any answer, and the plea whether he shall make any other answer than what is contained in the plea. Nor can the defendant by answer claim, what by disclaimer he has declared he has no right to. A plea, or answer, will therefore over-rule a demurrer, and an answer a plea; and if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.

^r Prac. Reg 141.

^s 2 Brown Parl Ca. 20, 21.

C H A P. VI.

Of Replications.

A Replication is the plaintiff's answer, or reply, to the defendant's plea, or answer. Formerly, if the defendant by his plea, or answer, offered new matter, the plaintiff replied specially^a; otherwise the replication was merely a general denial of the truth of the plea, or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. The consequence of a special replication was a rejoinder, by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication^b. If the parties were not then at issue, by reason of some new matter disclosed in the rejoinder which required answer, the plaintiff might surrejoinder to the rejoinder, and the defendant might in like manner adsurrejoinder, or rebut, to the surrejoinder^c. The inconvenience, delay, and unnecessary length of pleading, arising from these various allegations on each side^d,

^a Ord. Ch. Ed. 1698, 122.
Prac. Reg. 215.

^b 2 West. Symb. Chan.
195. a. 32. b. 246. b.

^c West Symb. Chan.
195. a. Prac. Reg. 314.

^d Ord. in Ch. Ed. 1698.
122.

occasioned

occasioned an alteration in the practice. Special replications, with all their consequences, are now out of use^e; and the plaintiff is to be relieved according to the form of the bill, whatever new matter may have been introduced by the defendant's plea, or answer^f. But if the plaintiff conceives, from any matter offered by the defendant's plea, or answer, that this bill is not properly adapted to his case, he may obtain leave to amend his bill, and suit it to his case, as he shall be advised. To this amended bill the defendant may make such defence as he shall think proper, whether required by the plaintiff to answer it, or not.

According to the present course of the court, although rejoinders are refused, yet the plaintiff, after replication, must serve upon the defendant a subpoena, requiring him to appear to rejoin; unless he will appear gratis^g. The effect of this process is merely to put the cause completely in issue between the parties. For now, immediately after the defendant has appeared to rejoin, or after the return of the subpoena to rejoin; which, by order obtained of course, is now usually made returnable immediately; the parties may proceed to the examination of witnesses to support the facts alledged by the pleadings on each side^h. If, by mistake, a replica-

^e Prac. Reg. 315.

^f Prac. Reg. 315.

^g Mosely, 123 296.

^h Mosely, 296. Prac. Reg.

314.

tion has not been filed, and yet witnesses have been examined, the court will permit the replication to be filed *nunc pro tunc* ¹.

Thus are the pleadings brought to a termination; for after examination of witnesses they cannot be altered, unless under very special circumstances, or in consequence of some subsequent event. For if the plaintiff at any time discovers that he has not made proper parties to his bill, he may obtain leave to amend his bill, for the special purpose of adding the necessary parties ^k; but after witnesses examined, and publication passed, the bill can be amended for no other purpose. And if any event happens, which alters the interest of any party, or gives any new interest to any person not a party, the plaintiff may file a supplemental bill, or bill of revivor, as the occasion may require. If too the plaintiff thinks some discovery from the defendant, which he has not obtained, is necessary to support his case, he may file a supplemental bill to obtain that discovery ^l. And if upon hearing the cause, the plaintiff appears intitled to relief, but the case made by the bill is insufficient to ground a complete decree, the court will frequently give the plaintiff leave to file a supplemental bill, to bring the necessary matter, in addition to the case made by the original bill, before the court ^m. If the addition of parties only is wanted,

ⁱ Moseley, 296.

^k 2 Atkyns, 15. 3. Atkyns, 370.

² ¹ Ch. Rep. 142. 3 At-

kyns, 370.

^m 3 Atkyns, 133.

an order is usually made for the cause to stand over, with liberty to amend the bill by adding the proper parties. But, in general, with respect to the original parties, and their interests, no amendment will be permitted after the cause is at issue, and witnesses have been examined, and publication passed; though a plaintiff has been permitted, even under such circumstances, to amend his bill, by adding a prayer omitted by mistake ⁿ.

ⁿ 3 Atkyns, 583.

F I N I S.



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